① Supreme Court, U.S.
FILED

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No. ________ OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1997

◆

TRIPLE A FIRE PROTECTION, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD AND ROAD SPRINKLER FITTERS LOCAL UNION 669, AFL-CIO,

Respondents.

◆

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

◆

PETITION FOR WRIT OF CERTIORARI

◆

Willis C. Darby, Jr.
Counsel of Record
Elizabeth D. Rehm
Post Office Box 2565
Mobile, Alabama 36652
(334) 432-2635

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

I. Whether a collective bargaining agreement which facially discriminates in favor of union members supports a presumption of majority status within the meaning of Section 9(a) of the National Labor Relations Act whether or not the constitution and by-laws of the union prohibit members from working with non-members.

II. Whether, on the evidence presented to the Board, a reasonable jury could have found that Triple A lacked a genuine, reasonable uncertainty about whether Local 669 enjoyed the support of an uncoerced majority of unit employees.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page. Triple A Fire Protection, Inc., the petitioner, is not publicly traded and has no parent or subsidiaries.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Triple A Fire Protection, Inc., respectfully petitions the Supreme Court to issue a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit to review a judgment enforcing an order of the National Labor Relations Board.

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OPINIONS BELOW

The opinion of the United States Court of Appeals appears at Appendix A to the Petition and is reported at 136 F.3d 727 (11th Cir. 1998). The first opinion of the National Labor Relations Board, including the opinion of the Administrative Law Judge, appears at Appendix B to the Petition and is reported at 312 NLRB 1 (1993). The second opinion of the National Labor Relations Board, including the supplemental opinion on remand of the Administrative Law Judge, appears at Appendix C to the Petition and is reported at 315 NLRB 409 (1994).

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JURISDICTION

The Court of Appeals issued its decision on March 2, 1998 (Appendix A). On July 1, 1998, the Court of Appeals denied Triple A's timely filed Petition for Rehearing and Suggestion for Rehearing En Banc (Appendix D).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

◆

STATUTES INVOLVED

Section 7 of the National Labor Relations Act, 29 U.S.C. § 157, in relevant part provides:

> [e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing . . . and shall also have the right to refrain from any and all such activities.

Section 10(b) of the Act, 29 U.S.C. § 160(b), in relevant part, provides:

> Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, . . . shall have power to issue . . . a complaint: . . . *Provided,* That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board. . . .

The foregoing and related statutes are set forth in full in Appendix E.

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STATEMENT OF THE CASE

Petitioner, Triple A Fire Protection, Inc. (Triple A), was formed in 1983 by a member of Road Sprinkler Fitters Local Union 669, AFL-CIO (Local 669), an affiliate of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada (United Association), to engage in the construction industry installing sprinkler systems.

For many years before Triple A was formed, Local 669 maintained a collective bargaining agreement (National Agreement) which covered forty-seven states, including Alabama, with an employer organization.

The 1982-85 National Agreement (Appendix F) provides, in pertinent part, that:

> **Probationary Period** . . . An Apprentice who satisfactorily completes the probationary period will be . . . initiated into Local Union No. 669 and enrolled in the Related Training Program.
>
> **Responsibilities of Apprentices** . . . The apprentice shall . . . abide by the working rules and regulations of . . . the local union . . .
>
> **Union Security:** . . . A person not a member of the United Association shall be acceptable for employment as a journeyman only after he has produced for the Employer sworn affidavits of four (4) years' experience in the Sprinkler Industry as a helper, apprentice and/or journeyman on the letterhead of his previous employer or employers, and such affidavits have been forwarded to the Union. . . .
>
> A person not a member of the United Association shall be acceptable for employment as an apprentice after he has [been] issued a probationary apprentice classification card by the Director of Apprenticeship of Local 669. If the Union is unable to furnish men to the Employer, and the Employer employs men not members of the United Association, these employees shall be paid the journeyman's rate provided in the Agreement. . . .
>
> **Dues Check-Off:** . . . An "Authorization for Check-Off of Work Assessment" form furnished

> by the Local Union, shall be given by the Employer to each new employee performing work under this Agreement, for the employee's consideration. . . .

The 1985-88 National Agreement (Appendix G) and 1988-91 National Agreement (Appendix H) contain union security, check-off, and apprenticeship provisions identical with the quoted provisions of the 1982-85 National Agreement, except for dates and affidavit period. Additionally, the 1985-88 National Agreement referred to pre-apprentices as well as apprentices.

Apprenticeship applicants were subject to the approval of Local 669 (Appendix I).[1]

The United Association Constitution § 154(a) provides in part:

> No journeyman member will be permitted to work with an apprentice or helper who is not a member except apprentices who have made an application for membership in the Local Union and the United Association

(Appendix L). Section 5 of the Working Rules of Local 669 provides in part that:

> No member of Local 669 shall work with sprinkler fitters who are not members of a United Association Local, except as may otherwise be provided in a United Association collective bargaining agreement

(Appendix M). Local 669 enforced its Working Rules and the United Association Constitution through fines levied against members, whose names and fines were regularly published in Local 699's monthly "NewsLetter" (Appendices M and N).

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[1] The Board rejected this documentary evidence.

On October 21, 1983, before Triple A had any employees, Triple A entered into a prehire agreement with Local 669 to be bound by the 1982-85 National Agreement. Triple A also agreed to be bound by the 1985-88 and 1988-91 National Agreements.

In April 1987, Local 669 began requiring apprentice applicants to sign a "Scholarship Loan Agreement" and a demand note which became due if and when the apprentice accepted employment in the pipe fitting industry with an employer that did not maintain a contract with the United Association (Appendix J).[2]

On October 12, 1987, Local 669 informed "All Independent Contractors" that the decision of the Board in "*John Deklewa and Sons*, 222 N.L.R.B. [1375] (1987)[3] . . . may throw into question the nature of [our] relationship." Local 669 requested an acknowledgment and on October 19, 1987, Triple A acknowledged that "on the basis of objective and reliable information . . . Local 669 is the exclusive bargaining representative of its sprinkler fitter employees pursuant to Section 9(a) of the . . . Act."

In December 1990 and March 1991, Local 669 threatened to strike Triple A if Triple A did not agree to be bound by the not yet negotiated National Agreement to become effective on April 1, 1991.[4] On March 21, 1991, Triple A submitted a complete contract proposal to Local 669. Triple A's proposal omitted the union security, check-off, and apprenticeship provisions of the National Agreement referred to *supra* pages 3-4. On March 26, 1991, Triple A informed Local 669 that strike replacements would be hired according to the terms of Triple A's proposal.

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[2] The Board rejected this documentary evidence.

[3] Enfd. sub nom. *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir.), *cert. denied*, 488 U.S. 889 (1988).

As of April 22, 1991, Triple A ceased making payments to the health, welfare, and pension funds as required by the expired National Agreement, employed persons who were not members of the United Association without requiring sworn affidavits from former employers, and paid such employees wages within the range of apprentice wages established in the expired National Agreement commensurate with their experience and ability rather than the journeyman rate of $15.47 as required by the union security provisions of the expired National Agreement. In October, 1991, applications of four employees of Triple A who were not members of the United Association to become apprentices were denied because, among other things, none would sign a Scholarship Loan Agreement (Appendix K).[5] On March 29, 1991, Local 669 signed an unfair labor practice charge which was docketed by the Board on April 4, 1991.

The complaint alleges that by virtue of Section 9(a) of the Act, Local 669 is the exclusive representative of Triple

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[4] Over 200 contractors agreed to be bound by the next National Agreement (Appendix C-20).

[5] The Board rejected this documentary evidence.

A's employees for the purposes of collective bargaining and that Triple A refused to bargain with Local 669 in violation of Sections 8(a)(5) and (1) of the Act by ceasing to make fringe benefit contributions and unilaterally changing the wage rates of new employees. Triple A asserted the affirmative defense that Local 669 never represented an uncoerced majority of Triple A's employees in an appropriate unit.

The Administrative Law Judge (ALJ) found that the "Government failed to establish that the Union's 8(f) status with Triple A matured into a 9(a) relationship" (Appendix C-7) relying on the Board's *Deklewa* holding that:

> union membership "is not always an accurate barometer of union support." *Deklewa* at 1383-84. And fringe benefit reports are described there as demonstrating only 'some degree of compliance with a benefit provision in the agreement.' Id. at 1384.

(Appendix C-25). The ALJ held that Triple A was "free to do as it pleased" after April 1, 1991, that Triple A's "affirmative defenses . . . are rendered moot" (Appendix C-27), and dismissed the complaint (Appendix C-7).

The Board reversed, holding that "the Board will not entertain a claim that majority status was lacking at the time of recognition" after more than six months had elapsed (Appendix C-5) and remanded the proceeding "for a resolution of the complaints unilateral changes and other allegations in light of our reversal of the judge's 8(f) finding" (Appendix C-6). The decision of the Board is barren of any attempt to assess the affect of the union security, check-off, and apprenticeship provisions of the

National Agreement which expired on March 31, 1991 on Local 669's presumption of majority status.

On remand Triple A reurged its defense that Local 669 never represented an uncoerced majority of its employees. The ALJ did not address this defense "because the Board's decision resolved the matter at this level" (Appendix B-9). The ALJ ordered Triple A to bargain with Local 669 as the exclusive bargaining representative of Triple A's employees, make the health, welfare, and pension funds and employees who had been employed at less than the journeyman's rate whole. The Board adopted the decision of the ALJ without addressing Triple A's exceptions (Appendix Q) relating to the union security, check-off, and apprenticeship provision, of the three National Agreements, Scholarship Loan Agreement, and the constitution and by-laws of Local 669 and the United Association (Appendix B-2-3).

On appeal Triple A argued that the defense that Local 669 never represented an uncoerced majority necessarily established that Triple A had a "good faith doubt" founded on an "objective basis" of Local 669's majority status. The Court of Appeals concluded that the "Board did not address the merits" of Triple A's argument "that various provisions in the collective bargaining agreements which the parties have signed over the years (and in the union constitution) discriminate in favor of union membership . . . because it found that section 10(b) and the Board's *Deklewa* decision foreclosed this defense" citing *Local Lodge No. 1424 (Bryan Mfg. Co.) v. NLRB*, 362 U.S. 411 (1960) (Appendix A-19) and enforced the Board's order.

Neither the ALJ, the Board, nor the Court of Appeals considered whether the maintenance of the 1988-91 National Agreement during the 10(b) period prevented Local 669 from representing an uncoerced majority of the employees of Triple A when the National Agreement expired on March 31, 1991.

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REASONS FOR GRANTING THE WRIT

I. THE DECISIONS BELOW PERPETUATE UNLAWFUL PRACTICES IN THE SPRINKLER FITTING INDUSTRY THROUGHOUT THE UNITED STATES

Here, as in *Allentown Mack Sales and Serv., Inc. v. NLRB*, ___ U.S. ___ (January 26, 1998), the Board failed to apply a clearly understood legal standard in determining whether an incumbent union is entitled to a presumption of majority support upon termination of a 9(a) agreement.

Normally an incumbent union is presumed to represent employees upon termination of a section 9(a) agreement. An employer may rebut this presumption and withdraw recognition by showing either (1) that the union did not in fact enjoy majority support or (2) that the employer had a good faith doubt, based on a sufficient objective basis, of the union's majority support. *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 778 (1990).

"Majority" as used in the Act means "uncoerced majority." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 592 (1969) ("A bargaining order will not issue . . . if the union obtained the cards through . . . coercion"); *NLRB v. Electric Vacuum Cleaner*, 315 U.S. 685, 687 (1942) (employer may not assist union even when the union has been selected by an uncoerced majority of its employees); *International Ass'n of Machinists v. NLRB*, 311 U.S. 72, 79 (1940) (union "did not represent an uncoerced majority of . . . employees, when the time the closed shop contract was executed").

The National Agreements are not valid 8(f) prehire agreements because they discriminate against "every person not a member of the United Association," including former and expelled members of the United Association, irrespective of length of service, where such person lives, or such person's occupation or skills. How many working people can obtain affidavits from their former employers to establish length of service?

The Scholarship Loan Agreement penalizes a worker who resigns from the United Association and exercises the Section 7 right to accept employment with a non-union pipe-fitting contractor even if such contractor performs pipe maintenance work in an industrial plant.[6] *Chambless v. Masters, Mates & Pilots Pension Plan*, 772 F.2d 1032 (2d Cir. 1985) (amendment to pension plan drafted by union that discriminated against employees who worked on non-union ships was arbitrary and capricious under ERISA). Requiring apprentices to abide by the working rules and regulations of Local 669 impermissibly strengthens Local 669's control over apprentices even before they are required to join Local 669. See, *Radio*

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[6] Scholarship loan agreements originated in the sheet metal industry. See *Joint Apprentices & Training Comm. v. Chapman*, 744 F. Supp. 1008 (D. Colo. 1990), for the origin of scholarship loan agreements.

Officers' Union v. NLRB, 347 U.S. 27, 40 (1954). The requirement that an employer pay the journeyman's wage rate to employees who Local 669 fails to accept as an apprentice makes it economically unfeasible to employ a "person not a member of the United Association."

Where an initial 9(a) agreement containing a union security provision is signed when the union did not represent a majority of the employees, "it is presumed that subsequent acquisition of a majority status is attributable to the earlier unlawful assistance received from the original agreement." *Local Lodge No. 1424,* 362 U.S. at 414.

The existence of the union security, check-off, and apprenticeship provisions of the National Agreements permits "the inference that the unit employees did not have that freedom of choice which is the essence of collective bargaining" and "is adequate to support the conclusion that the maintenance as well as the acquisition of the alleged majority was contaminated . . . " *International Ass'n of Machinists v. NLRB,* 311 U.S. 72, 79, rehearing denied 311 U.S. 729 (1940); *Allentown Mack Sales and Serv., Inc. v. NLRB,* ___ U.S. ___ (January 26, 1998) (the Board "must draw all those inferences that the evidence fairly demands").

The reliance of the Court of Appeals on *Local Lodge No. 1424 (Bryan Mfg. Co.) v. NLRB,* 362 U.S. 411 (1960), to avoid addressing the merits of Triple A's defenses is misplaced. *Bryan Mfg.* involved a collective bargaining agreement that was facially legal and executed more than six months before the charge was filed. In denying enforcement of the Board's order, the Court emphasized that "the entire foundation of the unfair labor practice charged was the Union's time-barred lack of majority status when the original collective bargaining agreement was signed"; i.e., there was no evidence of any illegal activity within six months of the filing of the charge. *Id.* at 417. The Court stressed that where, as here, illegal activity occurred within six months of the filing of the charge, the 10(b) period, evidence of a union's lack of majority when the initial agreement was signed was admissible, stating at 416:

> It is doubtless true that § 10(b) does not prevent all use of evidence relating to events transpiring more than six months before the filing and service of an unfair labor practice charge. However, in applying rules of evidence as to the admissibility of past events, due regard for the purposes of § 10(b) requires that two different kinds of situations be distinguished. The first is one where occurrences within the six-month limitations period in and of themselves may constitute, as a substantive matter, unfair labor practices. There, earlier events may be utilized to shed light on the true character of matters occurring within the limitations period; and for that purpose § 10(b) ordinarily does not bar such evidentiary use of anterior events.

The Taft-Hartley Act of 1947 amended the National Labor Relations Act to guarantee employees' rights not to become a union member subject to internal union rules and discipline, outlawed the closed shop which conditioned employment upon union membership, and made it "an unfair labor practice for a labor organization . . . to restrain or coerce employees in the exercise" of Section 7 rights.

During the entire 50 years since the passage of the Taft-Hartley Act, Local 669 has maintained a virtual closed shop in the unionized sprinkler fitting industry throughout the forty-seven states in which it operates through its constitution, by-laws, national agreements, apprenticeship programs, and scholarship loan agreements.

The panel's decision enforces a Board order that ignores "the interest in employee freedom of choice . . . given large recognition by the Act," and perpetuates a closed shop outlawed by Congress in 1947 in the Taft-Hartley Act. *Local Lodge No. 1424 v. NLRB*, 362 U.S. 411, 428 (1960); *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 610 (1969).

The decision of the Court of Appeals fails "to give effect to the principle of majority rule set forth in Section 9(a), a rule that is 'sanctioned by our governmental practices, by business procedure and by the whole philosophy of democratic institutions.' S. Rep. No. 573, 74th Cong. 1st Sess., p. 13." *NLRB v. A. J. Tower Co.*, 329 U.S. 324, 331 (1946).

II. THERE IS A CONFLICT AMONG THE COURTS OF APPEALS

The Eleventh Circuit's decision creates a conflict among the circuits on the important issue of the presumption of majority status upon the expiration of a collective bargaining agreement.

The Third and Sixth Circuits have refused to enforce Board refusal to bargain orders where the Board failed to consider pre-10(b) evidence relating to the original recognition of a union under Section 9(a) of the Act. The Second Circuit held that preferential hiring provisions of a labor contract in conjunction with a local union's constitution which prohibited members from working with persons not members of the United Association violated the Act. The Ninth Circuit has refused to consider pre-10(b) evidence relating to the original recognition of a union under Section 9(a) of the Act.

In *NLRB v. Dayton Motels, Inc.*, 474 F.2d 328, 333 (6th Cir. 1973), the Sixth Circuit, in reliance on *Bryan Mfg. Co.*, denied enforcement of a bargaining order and remanded to the Board to consider events relating to the union's tainted majority at the time the initial collective bargaining agreement was signed in determining whether the "employer had a reasonably-grounded belief that the Union did not represent an uncoerced majority of its employees." *Id.* at 331. The Sixth Circuit held:

> the circumstances surrounding the agreement gave the Company good reason to believe that the Union never did represent the uncoerced choice of a majority of its employees. The fact that this evidence could have been the basis of an unfair labor practice charge in 1967 is coincidental and ought not to render the evidence inadmissable for another purpose.

Id. at 333 (citing 1 Wigmore, Evidence § 13 (3d ed. 1940)).

In *Pick-Mt. Laurel Corp. v. NLRB*, 625 F.2d 476, 482 (3d Cir. 1980), the court held that the Board erred in applying the six month statute of limitations of Section 10(b) to exclude evidence concerning events surrounding the execution of the initial agreement, where the "factual findings of the ALJ . . . confirm the illegality of the original contract," because the union had not been selected by a majority of employees. The court rejected the Board's interpretation of *Bryan Mfg.* and remanded to the Board to consider the alleged "independent unfair labor practices occurring as to new employees hired within the six-month [10(b)] period" as well as the circumstances surrounding the execution of the initial agreement. *Id.* at 485. On remand, *Pick-Mt. Laurel Corp.*, NLRB 302, 303 (1981), the Board found that the execution of the initial agreement containing a lawful union security clause when the union did not represent a majority of the employees coupled with the employer's, both before and after the 10(b) period, unlawfully requiring new employees to sign applications for membership and dues check-off authorization at the time they were hired were "evidence of objective considerations supporting its good-faith doubt of the Union's majority status sufficient to rebut the Union's presumption of majority status."

In *NLRB v. Local 2, United Ass'n of Journeymen and Apprentices of the Plumbing and Pipefitting Indus.*, 360 F.2d 428, 432, 435 (2d Cir. 1966), the court held that a contractual provision that gave preference in hiring to union members "without regard to prior length of service" coupled with a union constitutional provision that provided "[n]o member may work for any employer who has in his employ any journeyman or apprentice who is not a member of the United Association" violated the Act. The Second Circuit concluded that the "hiring practices" in fact included recognition of the principle that members of

Local 2 would not work with a non-union man." *Id.* at 436.

The Ninth Circuit in *NLRB v. Denham*, 469 F.2d 239 (9th Cir. 1972), relying on Section 10(b) rejected the employer's argument that it had a "reasonable basis to doubt the existence of an uncoerced majority" based upon an oral agreement between the employer and the union that as part of the hiring process new employees would be given applications and dues check-off authorizations where all new employees joined the union. The court concluded that "since the record clearly shows that all or nearly all of those workers belonging to the Union were employed prior to the period beginning six months before the filing of the charge," the employer's defense failed. *Id.*, 245. This Court granted certiorari, vacated the judgment on other grounds, and remanded to the Court of Appeals citing *Burns International Security Services, Inc. v. NLRB*, 406 U.S. 272 (1972) (duty of successor to bargain). *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 245-250 (1972) ("the Commission has not rendered an opinion which, by the route suggested, links its findings and its conclusions"); *SEC v. Chenery Corp.*, 318 U.S. 80, 87-88 (1943) ("The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based.")

◆

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

WILLIS C. DARBY, JR.
Counsel of Record
ELIZABETH D. REHM
Post Office Box 2565
Mobile, Alabama 36652
(334) 432-2635

September 29, 1998

Appendices

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A. Decision of the United States Court of Appeals for the Eleventh Circuit.............. A-1

B. Supplemental Decision and Order of the National Labor Relations Board dated October 31, 1994 with the Supplemental Decision of the Administrative Law Judge on Remand attached.................................. B-1

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APPENDIX A

NATIONAL LABOR RELATIONS BOARD, Petitioner,
v. TRIPLE A FIRE PROTECTION, INC.,
Respondent, Road Sprinkler Fitters Local
Union 669, AFL-CIO, Intervenor.

No. 96-6944.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

136 F.3d 727; 1998 U.S. App. LEXIS 3660;
March 3, 1998, Decided

SUBSEQUENT HISTORY: Rehearing
En Banc Denied July 1, 1998, Reported at:
1998 U.S. App. LEXIS 20765.

PRIOR HISTORY: *Application for Enforcement of an Order of the National Labor Relations Board. (315 NLRB No. 55).*

DISPOSITION: Board's order ENFORCED.

COUNSEL: For APPELLANT(S): Aileen A. Armstrong, Deputy Associate General Counsel, NLRB, Charles P. Donnelly, Vincent J. Falvo, Jr., Washington, DC.

FOR INTERVENOR: William W. Osborne, Marguerite L. Graf, Washington, DC.

For APPELLEE(S): Willis C. Darby, Jr., Esq., Elizabeth D. Rehm, Mobile, AL.

JUDGES: Before ANDERSON and COX, Circuit Judges, and ALARCON*, Senior Circuit Judge.

OPINION BY: ANDERSON

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* Honorable Arthur L. Alarcon, Senior U.S. Circuit Judge for the Ninth Circuit, sitting by Designation.

OPINION: ANDERSON, Circuit Judge:

The National Labor Relations Board seeks enforcement of its October 31, 1994 order finding Triple A Fire Protection, Inc. in violation of sections 8(a)(1) and (5) of the National Labor Relations Act for unilaterally ceasing to make payments to fringe benefit plans, unilaterally reducing wage rates of bargaining unit employees, and directly dealing with employees outside the formal bargaining process. *29 U.S.C. §§ 158*(a)(1) and (5). The employer argues in its defense that the union never represented an uncoerced majority, that an impasse existed, that the union bargained in bad faith, and that an economic emergency justified their departure from the formal system of labor negotiations. We find substantial evidence to support the Board's findings and enforce its order.

I. BACKGROUND

Triple A Fire Protection, Inc. ("Triple A") was formed in 1983 by Alton Turner ("Turner") and engages in the business of installing and maintaining sprinkler and fire protection systems in Mobile, Alabama. Turner holds a controlling interest in the company's stock and his wife Lovina owns the remainder of the stock. Turner's son Steve also works for the company as a supervisor.

Since its founding, Triple A's employees have been represented by Road Sprinkler Fitters Union No. 669 ("Local 669"). Local 669 is headquartered in Landover, Maryland. Ronnie L. Phillips ("Phillips") is Local 669's regional representative and business agent in the southern district, which comprises Alabama, Mississippi, and

Puerto Rico. Since 1983, Phillips has represented Local 669 in all dealings with Turner and Triple A.

In October 1983, Turner (who had himself been a long-time member of Local 669) signed an agreement to be bound by the 1982-85 national agreement between the union and the National Fire Sprinkler Association, a multi-employer collective bargaining unit. Similarly, on February 8, 1984, Turner signed an "assent and interim agreement" binding Triple A to the 1985-88 section 8(f) prehire national agreement between the union and the national bargaining unit. *29 U.S.C. § 158*(f).[1]

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[1] Section 8(f) authorizes prehire contracts between employees and unions in the building and construction industries. Under section 8(f), an employer may enter into a prehire agreement with a union before a majority of employees has approved the union as its bargaining representative. This sanctioning of prehire agreements is an exception to the general rule of the National Labor Relations Act that guarantees employees the right to select their own bargaining representatives. Normally, in industries other than the construction industry, a union must be elected by a majority of the employees within a bargaining unit before that union can have the right to represent employees in the formal bargaining process pursuant to section 9(a). *29 U.S.C. § 159*(a).

Section 8(f) was created to deal with problems unique to the building and construction industries. Prior to the creation of section 8(f), the National Labor Relations Act prohibited employers from bargaining with an uncertified union and, under the Act, a union could not be certified as a bargaining representative until after employees were hired. Since the nature of the construction industry required employers to know their labor costs before the beginning of a project, Congress validated the practice of creating prehire contracts.

In February, 1987, the National Labor Relations Board decided *John Deklewa & Sons, 282 N.L.R.B. 1375,* enf'd sub nom, *Int'l Ass'n of Bridge, Structural and Ornamental Iron Workers Local No. 3 v. NLRB, 843 F.2d 770 (3rd Cir.1988),* cert. denied, *488 U.S. 889, 109 S. Ct. 222, 102 L. Ed. 2d 213 (1988).* The Board's decision in Deklewa substantially altered the relationship between construction industry employers and unions. The Board decided that section 8(f) prehire agreements were no longer terminable at will, but were valid and binding for the entire term of the contract. Also, the Board held that unions would not enjoy a presumption of majority status upon expiration of a section 8(f) agreement. See *U.S. Mosaic Tile Co. v. NLRB, 935 F.2d 1249, 1252 n.2 (11th Cir.1991)* (detailing the history of section 8(f) prehire agreements and the changes brought about by *Deklewa*). Of significance for this case, *Deklewa* abandoned the former "conversion doctrine" under which unions could very easily convert their status from that of a section 8(f) prehire to a full section 9(a) status.[2] *29 U.S.C. § 159*(a). *Deklewa* adopted a new and much stricter "conversion doctrine," under which the party asserting conversion has the burden of proving section 9(a) status, for example, either by election and Board certification or by voluntary recognition based upon a clear showing of majority support. *Deklewa, 282*

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[2] The pre-*Deklewa* cases permitted conversion to full section 9(a) status merely by showing that the union enjoyed majority support among the relevant employees at virtually any time after signing a section 8(f) agreement. *Deklewa, 282 N.L.R.B. at 1378 nn. 12-13.*

N.L.R.B. at 1385 n. 41, 1387 n. 53.[3] Upon conversion to full section 9(a) status, a union would enjoy all the rights of a majority representative under section 9(a), including a presumption of majority support upon expiration of a collective bargaining agreement and the correlative duty to bargain with respect to a new contract. Thus, after *Deklewa* the question of whether a union for a construction industry employer had satisfied the new and stricter "conversion doctrine" and achieved section 9(a) status became very important for both unions and employers.[4]

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[3] The Board wrote that "in light of the legislative history and the traditional prevailing practice in the construction industry, we will require the party asserting the existence of a 9(a) relationship to prove it." *Deklewa, 282 N.L.R.B. at 1385 n. 41.* Furthermore, the Board stated:

> We do not mean to suggest that the normal presumptions would not flow from voluntary recognition accorded to a union by the employer of a stable work force where that recognition is based on a clear showing of majority support among the unit employees, e.g., a valid card majority. That is, nothing in this opinion is meant to suggest that unions have less favored status with respect to construction industry employers than they possess with respect to those outside the construction industry.

Id. at 1387 n. 53 (citation omitted).

[4] It should be noted that this circuit has previously declined to specifically address *Deklewa*. See *Local Union 48 Sheet Metal Workers v. S.L. Pappas & Co., Inc. 106 F.3d 970, 974-75 (11th Cir.1997); U.S. Mosaic Tile, supra; Plumbers and Pipefitters Local Union 72 v. John Payne Co., Inc., 850 F.2d 1535, 1538 (11th Cir.1988).* Those cases addressed different issues from the conversion by voluntary recognition issue before us. In *Pappas,* the court observed our prior panel rule and followed the reasoning of John Payne concerning the ability of employers to repudiate section 8(f) agreements. *Pappas, 106 F.3d at 975.* Similarly, in *Mosaic* this court refused to address the use of

In light of the uncertainty raised by *Deklewa,* Local 669's business manager in Maryland mailed a letter with enclosures to Triple A. The letter stated that "[Deklewa] may throw into question the nature of the relationship between your organization and Local 669. The purpose of this letter is to solicit your cooperation in minimizing any possible disruption in our relationship that might otherwise be caused by the Deklewa decision." The letter requested that Triple A sign and return a recognition form confirming the union's status as the exclusive bargaining representative designated by a majority of Triple A's employees pursuant to section 9(a) of the Act. The recognition form provided:

> ACKNOWLEDGMENT OF THE REPRESENTATIVE STATUS OF ROAD SPRINKLER FITTERS LOCAL UNION NO. 669, U.A., AFL-CIO
>
> The employer executing this document below has, on the basis of objective and reliable information, confirmed that a clear majority of the sprinkler fitters in its employ have designated, are members of, and are represented by, Road Sprinkler Fitters Union No. 669, U.S., AFL-CIO, for purposes of collective bargaining.
>
> The employer therefore unconditionally acknowledges and confirms that Local 669 is the exclusive bargaining representative of its sprinkler fitter employees pursuant to Section 9(a) of the National Labor Relations Act.

Deklewa as an affirmative defense because the issue had not been raised in a timely fashion. *Mosaic, 935 F.2d at 1257.* The question before this court concerns issues involving *Deklewa* not addressed in the former cases and not affected by their determinations.

Accompanying the letter, Local 669 included a copy of a recent fringe benefit report filed by Triple A with the National Automatic Sprinkler Industry Fringe Benefit Funds listing eight names, including Turner and his son Steve. Turner testified before the administrative law judge ("ALJ") that the greatest number of workers employed in any given month was seven to eight. Alton Turner signed the recognition form on October 17, 1987.

Thereafter, Turner signed an agreement to be bound by a third successive bargaining agreement running from April 1, 1988, to March 31, 1991.[5] Toward the end of this agreement, on December 14, 1990, Local 669's business manager sent a letter to Triple A indicating the union's desire to negotiate another collective bargaining agreement effective April 1, 1991. The letter warned that if a renewal contract were not reached before March 31, 1991, then "lawful economic action" could ensue on or after April 1, 1991. The letter enclosed two copies of an "Assent and Interim Agreement" which would prohibit the signatories from negotiating a separate agreement with the Union and mandating that they observe the terms of the expired agreement until the effective date of a successor agreement. Turner never signed this assent form.

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[5] The 1988-91 collective bargaining agreement contained a recognition clause which stated:

> Recognition: The National Fire Sprinkler Association, Inc. for and on behalf of its contractor members that have given written authorization and all other employing contractors becoming signatory hereto, recognize the Union as the sole and exclusive bargaining representative of all Journeyman Sprinkler Fitters and Apprentices in the employ of said Employers, who are engaged in all work as set forth in Article 18 of this Agreement with respect to wages, hours and other conditions of employment pursuant to Section 9(a) of the National Labor Relations Act.

During the early spring of 1991, Turner approached employees on a number of occasions to discuss both their employment with Triple A and general status with the union. In early March, Turner approached employee Jack Moiren and told him that he would receive certain benefits if the company "went nonunion."[6] Later that month, Danny Carpenter, Cecil P. "Shorty" Davidson, and Moiren had a long conversation with Turner and his son Steve on the front porch of Triple A.[7] During the course of this discussion, Turner told Shorty that "no matter what happens you've got a job here for the same pay and you can pay half of your insurance." Also that month, while visiting Carpenter's home, Turner stated that he would not sign the union agreement, but would in any event raise Carpenter's wage rate to the foreman level.[8]

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[6] Specifically, Moiren testified before the administrative law judge that Turner promised him the equivalent of union wages, raises at the same time as union employees, and continued use of the company truck with gas paid.

[7] Danny Carpenter testified that he would occasionally drink beer with Turner. He also testified that, on one occasion in late February or early March, Turner approached him, Moiren, and Philip Alan Thames while they stood on the front porch of Triple A and told them that, in the event that he did not sign the National Agreement, he would guarantee them a foreman's job, paid insurance, and a truck.

[8] In March, 1991, Alton Turner's son Steve Turner approached Thames and promised him continued employment

On March 18, 1991, Phillips telephoned Turner to ask him if they could get together to discuss the negotiation of a renewal contract.[9] Turner responded that he had business to attend to the following day in Atlanta and they set no date for a meeting. The following day, Phillips made a surprise visit to Triple A where he found Turner. Turner testified that the business trip to Atlanta had been canceled. Phillips asked Turner if he would sign the interim agreement and told him that he had a copy of it ready in his briefcase. Turner responded that he would not sign a "blank check" and informed Phillips that he was preparing a proposed contract to submit to the union. On March 21, Turner mailed Triple A's proposal for a complete contract to the union.

Also on March 21, Phillips wrote Turner expressing a need to "avert a work stoppage on April 1, 1991." In reference to their contacts on March 18 and 19, Phillips

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at $14.00 per hour with paid insurance if the company "did not sign the contract." In addition, Steve Turner alluded to the creation of a retirement or profit-sharing plan for the benefit of employees.

[9] Without Phillip's knowledge, Turner tape recorded this conversation. The administrative law judge excluded a transcript of this and another conversation from evidence. The appellant argues that these transcripts should not be excluded from evidence. We have reviewed the excluded transcripts and cannot conclude that the exclusion affected any substantial rights of Triple A. The company apparently complains about the denial of some impeaching evidence which we do not find significant. Thus, we need not address the legal issue raised by Triple A.

The other evidentiary issues raised by Triple A are without merit and warrant no discussion.

accused Turner of refusing to negotiate with the union. Although the union's March 1991 newsletter indicated that some employers would be struck, Phillips instructed Triple A employees to report to work on April 1. On March 26, Turner wrote to Phillips that strike replacements would be hired according to the terms of Triple A's proposed contract. On April 1, no strike occurred and union employees reported to work at Triple A.

On April 3, Phillips and Turner agreed to begin negotiations on April 9.[10] On April 9, the parties met to begin formal bargaining sessions at the Bradbury Inn in Mobile, Alabama. The union was represented by Clarence Radecker and Phillips. Triple A was represented by Turner and attorney Deborah H. Kehoe. At the meeting, Turner submitted a list of 23 jobs that it had bid on but lost in the past year when the bids were based on union wages and benefit cost levels. The notes of the meeting indicate that neither party really discussed these figures in much detail. The ALJ found that they did not talk long enough to indicate to the union that there was an economic emergency as the company asserts. The parties discussed Triple A's proposed contract and tentatively approved a limited number of provisions. The union promised that it would submit counter-proposals as to several provisions during future bargaining. Although the meeting lasted much of the day, the parties accomplished little and a second meeting was scheduled for April 30, 1991, the date suggested by Turner. Neither party mentioned any deadline for negotiation.

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[10] On April 4, Turner wrote Phillips to confirm the meeting of April 9. This letter indicated that Turner had not received Local 669's counterproposal to Triple A's complete contract submitted in late March. Turner expressed an interest in having the union's counterproposal sent to him by express mail so that he could review it before the April 9 meeting. On April 5, Phillips sent his own confirmation letter to Turner (apparently crossing Turner's letter in the mail). Phillips stated in this letter that he had some questions about Triple A's proposal and that he had some of his own contract proposals to add to negotiations on April 9.

On April 12, 1991, Turner mailed a letter to the union accusing it of not "seriously addressing" the company's March 21, 1991, proposal. The letter asserted that since the union had failed to submit a "meaningful proposal to Triple A," they "[could] no longer tolerate [Local 669's] inaction." The company issued an ultimatum that would effectuate its proposed contract if no agreement was reached with the union prior to April 22, 1991. The letter indicated that Triple A was available to negotiate prior to this date, but firmly stated that changes would be implemented on April 22, 1991. Phillips received Triple A's demand on April 16, 1991. Phillips wrote to Triple A on April 17 confirming the April 30 meeting.[11] As of April 22, 1997, Triple A ceased making payments to the health, welfare, and pension funds as required by the expired collective bargaining agreement, and hired employees at wage rates different from those specified in the expired collective bargaining agreement.

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[11] Before the administrative law judge, Phillips testified that he "didn't see any reason to change the date" that the parties had formerly agreed upon to sit down and negotiate a new agreement. He didn't specifically respond to the letter sent by Triple A, because he thought Triple A was trying to "set me up for something that I didn't understand."

At the second meeting on April 30, 1991, the parties made little progress on reaching an agreement. The union, represented by Billy Littleton, objected to Triple A's implementation of its proposal and informed the company that it actions constituted an unfair labor practice. Littleton told Turner and Kehoe that Local 669 and the company had a section 9(a) relationship which required Triple A to bargain with Local 669 concerning the terms and conditions of the expired collective bargaining agreement until the parties reached an impasse or negotiated a new agreement. Although Triple A stated that they were willing to bargain until a new agreement could be worked out, Littleton told Triple A that he was not prepared to bargain the next day.

II. PROCEDURAL HISTORY

The Regional Director of Region 15 issued a complaint on September 27, 1991, alleging violations of sections 8(a)(1) and (5) of the National Labor Relations Act (the "Act"). *29 U.S.C. §§ 158*(a)(1) and (5). On March 26, 1993, the ALJ issued a decision finding that the contract between Local 669 and Triple A was a section 8(f) prehire agreement and not a section 9(a) collective bargaining agreement. *Triple A Fire Protection, 312 N.L.R.B. 1088, 1093-94,* (1993), supplemental decision *315 N.L.R.B. 409,* (1994). The General Counsel filed exceptions to this finding and the Board, on October 16, 1993, reversed this holding and determined that the agreement was a collective bargaining agreement under section 9(a) of the Act. *Triple A, 312 N.L.R.B. at 1088-89.* The Board stated that Triple A "voluntarily and unequivocally granted recognition to the Union as 9(a) representative." *Id. at 1088.*

Relying on *Deklewa*, the Board found that the union's section 9(a) status mandated that the six month statute of limitations as codified in section 10(b) precluded an inquiry into Triple A's defense that the union never represented an uncoerced majority of Triple A's employees. *Id. at 1089*. Consistent with these findings, the Board remanded the case to the ALJ for further disposition.

In the supplemental decision of January 19, 1994, the ALJ found that Triple A violated sections 8(a)(1) and (5) of the Act by bypassing the proper bargaining channels and dealing directly with employees, by unilaterally reducing wage rates for bargaining unit employees, and by unilaterally ceasing to make required fringe-benefit payments to established benefit plans. *Triple A Fire Protection, 315 N.L.R.B. 409, 422*. In response to Triple A's asserted defenses, the ALJ noted the Board's ruling that section 10(b) barred Triple A's defense that the union never represented an uncoerced majority, and then the ALJ determined that the evidence did not support a finding that an impasse existed, that the union bargained in bad faith, that the union waived its right to bargain over changes, or that an economic hardship existed. *Id. at 416-22. 29 U.S.C. § 160*(b). On October 31, 1994, the Board affirmed the ALJ's findings and conclusions and adopted the order. *Id. at 409*. We address each of the above issues in turn.

III. DISCUSSION

In reviewing a factual determination of the National Labor Relations Board, we analyze the totality of the record to determine whether the conclusion is supported by substantial evidence. *Northport Health Serv., Inc. v. NLRB, 961 F.2d 1547, 1550 (11th Cir.1992).* Substantial evidence constitutes more than a mere scintilla of evidence. *Id.* The Board's order may only be enforced if the record reflects "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* (quoting *Universal Camera Corp. v. NLRB, 340 U.S. 474, 477, 71 S. Ct. 456, 459, 95 L. Ed. 456 (1951)).* Furthermore, the Board cannot ignore relevant evidence that detracts from its findings because such evasion detracts from a finding of substantial evidence. *Id.*

A. CONVERSION OF THE SECTION 8(f) AGREEMENT INTO SECTION 9(a) STATUS

The Board found that the relationship between Local 669 and Triple A had been converted into full section 9(a) status by virtue of Triple A's October 1987 voluntary recognition of Local 669 as having been designated by a clear majority of Triple A's employees as their exclusive bargaining representative. As noted above, Local 669 mailed the voluntary recognition form to Triple A with a cover letter calling attention to the then recent *Deklewa* decision. The letter also enclosed a list of Triple A's eight employees indicating that they were members of Local 669. The voluntary recognition form expressly and clearly called on Triple A to confirm "that a clear majority of . . . [its employees] have designated, are members of, and are represented by . . . [Local 669] . . . for the purposes of collective bargaining." Because only eight employees were involved and because Triple A's owner himself, Turner, and his son Steve were among the eight, the Board could reasonably conclude that Turner would have actually verified and known that a clear majority of the employees had designated Local 669 as their exclusive bargaining representative, as called for by the form he signed.[12]

Indeed, Triple A does not in its brief on appeal challenge the Board's finding that the conversion to full section 9(a) status was achieved. Moreover, on these facts the NLRB has satisfied the *Deklewa* standard that a "voluntary recognition . . . [be] based on a clear showing of majority support." *Deklewa, 282 N.L.R.B. at 1387 n. 53.* See *MFP Fire Protection, Inc. v. NLRB, 101 F.3d 1341, 1343 (10th Cir.1996).* Having established its full section 9(a) status, it follows that Local 669 was entitled to a presumption of majority support upon the expiration of the collective bargaining agreement at the end of March 1991. Similarly, both parties had a duty to bargain in good faith, and

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[12] Some of the Board's decisions following *Deklewa* seem to suggest that the Board might be applying a kind of estoppel doctrine, so that an employer that voluntarily recognizes a union based solely on the union's assertion of majority status is thereafter limited in its freedom to repudiate same, even though the employer did not actually verify the majority status at the time. See *Hayman Electric, 314 N.L.R.B. 879, 887 n. 8.* As indicated in the text, the case before us is much easier, involving as it does very strong evidence that Local 669 enjoyed majority status at the time, and that Turner knew that. For this reason, and because Triple A has not challenged the majority status (except for its coercion claim), we need not address an estoppel type theory.

Triple A had a duty not to deal directly or make unilateral changes in violation of section 8(a)(5).[13]

B. TRIPLE A's VIOLATIONS OF SECTIONS 8(a)(1) and (5)

1. Direct Dealing

Section 8(a)(5) creates an obligation on the part of the employer to bargain with the incumbent union as the exclusive bargaining representative of its employees. "The employer's statutory obligation is to deal with the employees through the union, and not with the union through the employees." *General Electric Company, 150 N.L.R.B. 192 (1964).* The repeated efforts of Turner and his son Steve to deal directly with employees outside the normal channels of collective bargaining are amply supported in the record. On a number of occasions, Turner attempted to dissuade employees from supporting the union and create incentives for them to abandon their support for the union. These actions are per se violations of sections 8(a)(1) and (5) of the National Labor Relations Act. *Medo Photo Supply Corp. v. NLRB, 321 U.S. 678, 684-88, 64 S. Ct. 830, 833-35, 88 L. Ed. 1007 (1944); Cagle's Inc. v. NLRB, 588 F.2d 943, 948 (5th Cir.1979).* Therefore, we enforce the Board's order concerning these violations.

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[13] Consistent with Triple A's failure to argue that there was no conversion to full section 9(a) status, Triple A does not argue that there was merely a section 8(f) relationship, and thus upon expiration of the agreement, Triple A had no duty to bargain or other obligations to Local 669.

2. Unilateral Changes

The Board has taken the position that allowing employers to make unilateral changes in the terms and conditions of employment which are subject to negotiation would decrease the ability of parties to bargain effectively. *Litton Financial Printing, Div. v. NLRB, 501 U.S. 190, 198, 111 S. Ct. 2215, 2221, 115 L. Ed. 2d 177 (1991).* As the Supreme Court determined in *NLRB v. Katz, 369 U.S. 736, 743, 82 S. Ct. 1107, 1111, 8 L. Ed. 2d 230 (1962),* "[a] refusal to negotiate in fact as to any subject which is within § 8(d), and about which the union seeks to negotiate, violates § 8(a)(5) though the employer has every desire to reach agreement with the union upon an over-all collective agreement and earnestly and in all good faith bargains to that end." Therefore, "an employer commits an unfair labor practice if, without bargaining to impasse, it effects a unilateral change of an existing term or condition of employment." *Litton, 501 U.S. at 198, 111 S. Ct. at 2221* (citing *NLRB v. Katz, 369 U.S. 736, 82 S. Ct. 1107, 8 L. Ed. 2d 230 (1962)).*

In this case, the Board adopted the ALJ's findings that Triple A violated sections 8(a)(5) and (1) of the Act by ceasing to make contributions to the pension and benefit funds. The record supports this finding. On April 9, Local 669 and Triple A met for the first formal bargaining session following the expiration of the collective bargaining agreement. The parties read over Triple A's proposed contract and Local 669 submitted its own minor suggestions. At this meeting, Triple A submitted to Local 669 a list of 23 jobs that it had bid for in the last year and not received, allegedly due to the union wage and benefit levels. Although the parties met for much of the day, excluding breaks and lunch, they made little progress, but agreed to meet again in about three weeks, on April 30.

Three days later, the employer sent the union a letter indicating that it would stop making payments to the employee pension and health funds on April 22. The union representative received the letter on April 16 and responded merely by affirming the April 30, 1991, meeting. On April 22, 1991, the employer ceased funding the plans. Similarly, the employer admitted in its answer that following April 21, 1991, employees were hired at wage rates not specified in the expired collective bargaining agreement. At the meeting on April 30, 1991, the union representative objected to the employer's unilateral implementation of its own plan. We find that this evidence substantially supports the findings reached in the Board's order.

C. TRIPLE A'S DEFENSE: THE MAJORITY WAS COERCED.

Triple A's first defense is that Local 669 never represented an uncoerced majority of its employees because the 1988-91 National Agreement discriminated in favor of union members, and thus was coercive. The gist of Triple A's argument is that various provisions in the collective bargaining agreements which the parties have signed over the years (and in the union constitution) discriminate in favor of union membership, and thus the union majority which existed at the time of the October 1987 voluntary recognition was a coerced majority. The Board did not address the merits of this challenge to Local 669's majority status, because it found that section 10(b) and the Board's *Deklewa* decision foreclosed this defense. *29 U.S.C. § 160*(b).

It has long been recognized that section 10(b) prohibits employers from waiting more than six months to attack the majority status of union representation at the time of recognition.[14] In 1960, the Supreme Court so held in *Local Lodge No. 1424 (Bryan Mfg. Co.) v. NLRB, 362 U.S. 411, 80 S. Ct. 822, 4 L. Ed. 2d 832 (1960)*. There, a union and an employer had entered into a collective bargaining agreement containing a "union security" clause at a time when the union lacked majority status. A "union security" clause required all employees to become and remain members of the union. It was an unfair labor practice to enter into such an agreement if at the time of execution the union did not represent a majority of the employees. Ten months later, the employees filed an unfair labor practice charge, alleging the union's lack of majority status at the time of execution and the consequent illegality of the continued enforcement of the agreement. The Supreme Court held that, although an unfair labor practice occurred at the time of the illegal recognition, the six-month limitations proviso of section 10(b) barred the unfair labor practice complaint. Accord *Daisy's Originals, Inc. of Miami v. NLRB, 468 F.2d 493, 501 (5th Cir.1972)* (citing *International Assoc. of Machinists, AFL-CIO (Bryan Mfg. Co.) v. NLRB, 362 U.S. 411, 80 S. Ct. 822, 4 L. Ed. 2d 832 (1960))*.

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[14] See *NLRB v. Viola Industries-Elevator Div., 979 F.2d 1384, 1387 (10th Cir.1992); Brower's Moving & Storage, Inc., 297 N.L.R.B. 207, 209 n. 11*, ("An employer may not defend against a refusal-to-bargain allegation on the basis that the original recognition, occurring more than 6 months before charges have been filed in the proceeding raising the issue, was unlawful. Any such defense is barred by Section 10(b) of the Act.") (quoting *Morse Shoe, Inc., 227 N.L.R.B. 391, 394).*

In this case, the Board held that its decision in *Deklewa* had established that unions in the construction industry which had achieved full section 9(a) recognition should not have less favored status than unions outside the construction industry. Thus, the Board held that the six-month limitations period of section 10(b) was applicable and that a challenge to a union's majority status would not be entertained after a lapse of more than six months. We hold that the Board's interpretation is reasonable. As discussed above, the relationship between Local 669 and Triple A in this case was converted to full section 9(a) status by the October 1987, voluntary recognition. Under *Deklewa,* Local 669 thus enjoyed section 9(a) status, just as any other union outside the construction industry. *Deklewa, 282 N.L.R.B. at 1387 n. 53.* We find nothing unreasonable in the Board's conclusion in *Deklewa* and in the instant case; after achieving full section 9(a) status, Local 669 was entitled to full membership in section 9(a) status, including the application of section 10(b).

Applying section 10(b) to the facts of the instant case, the Board declined to entertain the merits of Triple A's challenge to Local 669's majority status because Triple A waited almost four years after the October 1987 voluntary recognition to object. We find no error in the Board's application of the section 10(b) bar to the facts of this case.[15] Accord *MFP Fire Protection, supra, at 1343;* see also *NLRB v. Viola Industries-Elevator Div., Inc., 979 F.2d 1384, 1387 (10th Cir.1992).*

After applying section 10(b) pursuant to the *Deklewa* mandate that unions in the construction industry which had achieved full section 9(a) status should not have less favored status than unions outside the construction industry, the Board in the instant case cited *Casale Industries, 311 N.L.R.B. 951.* Like the Board in the instant case, its decision in *Casale* also relied upon *Deklewa* as authority for applying section 10(b) in an analogous situation. Triple A observes that *Casale* was decided after the relevant events in this case. Therefore, Triple A argues, *Casale* should not be applied retroactively. We reject Triple A's argument. As indicated above, the controlling authority relied upon by the Board in the instant case was *Deklewa,* which predated the relevant events in this case. Because *Deklewa* established that unions in the construction industry which had achieved full section 9(a) status should not have less favored status than unions outside the construction industry, it follows that the six-month limitation period of section 10(b) would be applicable. There is no retroactivity problem.[16]

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[15] Section 10(b) bars Triple A's challenge to the majority status of Local 669 as of October 1987. We note, however, that section 10(b) does not leave a company without other remedies if a union no longer enjoys majority status. For example, one treatise states:

> An employer may withdraw recognition from an incumbant union at any time when such withdrawal is not precluded by law, if it can affirmatively establish either (1) that the union no longer enjoyed majority status when recognition was withdrawn, or (2) that the withdrawal was predicated on a reasonably grounded doubt as to the union's continued majority status, which doubt was asserted in good faith, based upon objective considerations, and raised in a context free of employer unfair labor practices.

1 The Developing Labor Law 571 (Patrick Hardin et al. eds., 3rd ed.1992) (footnote omitted). In the instant case, Triple A makes no such argument.

D. TRIPLE A's OTHER DEFENSES

As the administrative law judge noted, an employer may rebut a showing that unilateral changes were made by asserting the existence of certain affirmative defenses, notably that the parties reached an impasse, delay or bad faith by the union, and economic hardship.

Triple A argues in its defense that the negotiations had reached an impasse at the time it made its unilateral changes. As this court has stated, an "impasse is a deadlock in negotiations and presupposes [good faith] negotiations." *Electric Machinery Co. v. NLRB, 653 F.2d 958, 963 (5th Cir.1981).*[17] The determination of impasse involves an inquiry into "a myriad of circumstances," including (1) the background and relationship of the parties, (2) their willingness to negotiate, (3) the extent and frequency of bargaining, (4) the integrity of the bargaining, and (5) the good or bad faith of the parties. *Id. at 963 n. 5.*

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[16] *Deklewa* was decided on February 20, 1987, before the relevant events in this case. Thus, Triple A's discussion of cases questioning the retroactivity of *Deklewa* is not relevant to this case.

[17] In *Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir.1981)* (en banc), this court adopted as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981. *Id. at 1209.*

At the point Triple A decided to institute its unilateral changes, there had been only one formal session to discuss the respective positions of the parties. The negotiations were still in a stage of exploration, as both sides were still reading and considering the positions of the other party. Triple A did not even have possession of a full union proposal for its consideration. Although Triple A argues that the union's failure to submit a full-length proposal at this early point in the bargaining process indicated their bad faith, and a "take-it-or-leave-it" approach, the union had submitted counter-proposals at the April 9 meeting and had specifically agreed to continue negotiations in the future. When Triple A mailed the letter to the union on April 12 indicating that it was going to make unilateral changes, and when it actually made such changes on April 22, the parties had already agreed to a bargaining session later in the month. We readily conclude that there is substantial evidence in the record as a whole to support the finding that the parties had not reached an impasse in bargaining.[18]

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[18] Triple A also argues in defense of the unfair labor charges that Local 669's bad faith justified its unilateral changes. The company asserts that, from the beginning of negotiations, the union had absolutely no intention of entering into an agreement separate from the National Agreement negotiated with the multi-employer collective bargaining unit. The union simply expected Triple A to sign onto the National Agreement as it had on three previous occasions. In support of its allegation of bad faith, Triple A produced evidence of Phillips's behavior

Triple A argues that, in the event that this court finds that an impasse did not exist at the time unilateral changes were made, an exception to the rule of impasse applies in this case. Triple A asserts that when, upon expiration of a collective bargaining agreement, the union unreasonably delays or stalls the bargaining process, the employer may make unilateral changes without bargaining to impasse if it first notifies the union of its intent to make these changes. See *NLRB v. Pinkston-Hollar Construction Services, Inc., 954 F.2d 306, 311 (5th Cir.1992).*

Triple A contends that *Pinkston-Hollar* supports its argument that a waiver of rights occurred. However, the facts of *Pinkston-Hollar* are very different from those of the instant case. In *Pinkston-Hollar*, the employer and the union had conducted months of formal bargaining sessions. Finally, after informing the union of its interest in considering a new benefits package, and after several

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at the April 9 meeting, the union's failure to bring a comprehensive counter-proposal to the first meeting, and the union's history of relying upon the National Agreement. The company also argues that the union representatives simply read aloud the company proposal at the April 9 negotiating session.

At the initial April 9 meeting, the union examined the employer's proposal and displayed a willingness to extract all references from its own counter-proposals to the multi-employer bargaining unit. Furthermore, while Phillips himself had never negotiated an agreement separate from the National Agreement, he testified that Local 669 had negotiated agreements separate from the National Agreement. While the record contains conflicting evidence (with inferences of bad faith on the part of both parties), we cannot conclude that the ALJ's finding is without substantial support in the record. Accordingly, we reject Triple A's bad faith defense.

unsuccessful attempts to get a copy of the existing union benefits package, the employer informed the union that it intended to cease participation in the union plan and substitute its own plan effective some forty days hence, and invited the union to bargain over the matter. In two intervening bargaining sessions, the union declined to bargain over the issue. When reminded that the company planned to implement the change, the union made no request for a postponement. The ALJ found that the union failed to act with due diligence. Assuming arguendo that the *Pinkston-Hollar* rule is applicable in this circuit, we find that the facts of this case are clearly insufficient to justify an exception to the general duty to bargain to impasse.

Here, the negotiations had barely begun. Local 669 was not found guilty of delay, and in fact there was only minimal delay before Triple A instituted unilateral changes. Moreover, Triple A's April 12, 1991, ultimatum was not comparable to the *Pinkston-Hollar* notice. Triple A's letter gave only ten day's advance notice, and only six days from Local 669's receipt. Moreover, the April 30 negotiation session had already been scheduled before the unilateral changes were announced.

We return next to Triple A's waiver argument. In concluding that the union did not waive its statutory right to bargain over any terms and conditions of employment, the administrative law judge relied on the Board's decision in *Bottom Line Enterprises, 302 N.L.R.B. 373,* In *Bottom Line,* the Board noted that "when . . . the parties are engaged in negotiations, an employer's obligation to refrain from unilateral changes extends beyond the mere duty to give notice and an opportunity to bargain; it encompasses a duty to refrain from implementation at all, unless and until an overall impasse has been reached on bargaining for the agreement as a whole." *Id. at 374. Bottom Line* recognized two exceptions to this general rule: when a union delays the process of bargaining and when "economic exigencies compel prompt action." *Id.* Under the circumstances here – after meeting for the first time on April 9 and, at that meeting, establishing a date to meet for a second discussion – substantial evidence supports the finding that the union intended to continue negotiations and did not lack due diligence in bargaining. We find that there is no merit to the employer's argument that the union waived its right to bargain.

Finally, we find no merit to Triple A's contention that its economic situation justified the unfair labor practices. A situation of economic necessity requires either a showing of "extenuating circumstances" or a "compelling business justification" that is not present here. *Winn-Dixie Stores, 243 N.L.R.B. 972, 974 n. 9.* The mere assertion that the company lacks the financial ability to make the required fringe benefit payments does not justify these unilateral changes. *Stevens & Assoc. Constr. Co., 307 N.L.R.B. 1403, 1403.* The fact that Turner submitted a list of 23 jobs that he had bid for and lost in the past year did not establish that the company was in grave economic difficulty. Indeed, the parties did not even discuss the issue at the April 9 meeting. The employer clearly did not satisfy its burden and establish that its economic situation warranted a unilateral change in the terms and conditions of employment.

IV. CONCLUSION

In the instant case we find substantial evidence to support the Board's conclusion that Triple A violated sections 8(a)(1) and (5) of the Act by directly dealing with employees outside the bargaining process, by unilaterally ceasing to make payments to the fringe benefit plans, and by unilaterally reducing the wage rates for bargaining unit employees. We find no error in the Board's decision applying section 10(b) and declining to address the merits of Triple A's coerced majority defense. We also find no merit to the employer's defenses regarding impasse, bad faith, or economic necessity.

The Board's order is ENFORCED.

APPENDIX B

TRIPLE A FIRE PROTECTION, INC. and UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, ROAD SPRINKLER FITTERS LOCAL UNION NO. 669, AFL-CIO

Case 15-CA-11498

NATIONAL LABOR RELATIONS BOARD

315 N.L.R.B. 409; 1994 NLRB LEXIS 17; 148 L.R.R.M. 1162;
315 NLRB No. 55

October 31, 1994

SUPPLEMENTAL DECISION AND ORDER

By James M. Stephens, Member, Dennis M. Devaney, Member, Margaret A. Browning, Member.

OPINION:

On January 19, 1994, Administrative Law Judge Richard J. Linton issued the attached supplemental decision.[1] The Respondent, the Charging Party, and the General Counsel filed exceptions and supporting briefs, answering briefs, and reply briefs.

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[1] On October 19, 1993, the Board reversed the judge, found that the collective-bargaining agreement between the parties was a 9(a) contract, and remanded the case to the judge to address the merits of the complaint's allegations that the Respondent made unlawful unilateral changes and bypassed the Union by dealing directly with the employees. *312 NLRB 1088.*

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the supplemental decision and the record in light of the exceptions and briefs[2] and has decided to affirm the judge's rulings, findings as modified,[3]

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[2] The General Counsel filed motions to strike the Respondent's brief in support of exceptions and reply brief because each (with the appendices attached) exceeded the page limits allowed in the Board's Rules. Having examined the contents of the appendices, we do not agree with the General Counsel that the Respondent's appendices are attempts to evade the page limitations of Sec. 102.46(h) and (j) of the Board's Rules. The motions are denied.

[3] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products, 91 NLRB 544 (1950)*, enfd. *188 F.2d 362 (3d Cir. 1951).* We have carefully examined the record and find no basis for reversing the findings.

In the fourth sentence of the first paragraph in Sec. III,D,1,b, "1993" should read "1991." We correct this inadvertent error.

We also note that in sec. III,E,2, what the judge quotes as the Respondent's answer to par. 12 of the complaint is actually an answer to another paragraph. The correct quotation should read:

> Triple A denies the averments of paragraph 12 of the complaint, except Triple A admits that pursuant to written notice to the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Road Sprinkler Fitters Local Union No. 669, AFL-CIO (Union), dated April 12, 1991, Triple A on May 14, 1991, effective April 22, 1991, ceased making fringe

and conclusions[4] and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Triple A Fire Protection, Inc., Semmes, Alabama, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Dated, Washington, D.C. October 31, 1994

James M. Stephens, Member

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benefit payments which had been required by the 8(f) prehire agreement that expired on March 31, 1991.

Finally, we note that no exceptions were filed to the judge's supervisory status findings.

[4] In adopting the judge's finding that the parties did not reach impasse after April 22, 1991, and that therefore the Respondent's remedial obligations were not tolled, we note in addition that at no point after April 22, 1991, did the Respondent declare that the parties were at impasse, nor did it announce that it was reimplementing its final contract proposal. Rather, the parties continued to discuss contract proposals and bargaining was not deadlocked on any topic.

Because Member Browning agrees with her colleagues and the judge that the parties did not bargain to a good-faith impasse after the Respondent implemented its unilateral changes on April 22, 1991, she finds it unnecessary to consider whether events after April 22 could operate to toll the Respondent's liability. She would not rely on *Dependable Maintenance Co., 274 NLRB 216 (1985)*, supplemental decision *276 NLRB 27 (1985)*.

Dennis M. Devaney, Member

Margaret A. Browning, Member

ALJ:

RICHARD J. LINTON

ALJ-DECISION:

SUPPLEMENTAL DECISION ON REMAND

RICHARD J. LINTON, Administrative Law Judge

Statement of the Case

Finding only an expired 8(f) contract in my initial decision in this case, I dismissed the complaint. After reversing my finding of no contract under Section 9(a) of the Act, the Board remanded this case for me to address the merits of the complaint's unilateral change and other allegations. *Triple A Fire Protection, 312 NLRB No. 162* (Oct. 19, 1993). As necessary, I shall restate the summary from my initial decision to avoid causing the parties to have to switch between decisions while reading.

Respecting the merits, I find that, as alleged by the General Counsel, TAF bypassed the Union and dealt directly with its employees in February and March 1991 and made unilateral changes on April 22, 1991, all in violation of Section 8(a)(5) and (1) of the Act. Finding no merit to TAF's affirmative defenses, and finding no impasse in the bargaining which occurred after the unilateral changes of April 22, I order TAF to cease its unlawful conduct, to make whole all benefit funds and any bargaining unit employees, and, on request by the Union, to rescind any of the unilateral changes made.

I presided at this 7-day trial, opening August 25, 1992 and closing December 17, 1992, in Mobile, Alabama pursuant to the September 27, 1991 complaint issued by the General Counsel of the National Labor Relations Board through the Acting Regional Director of Region 15 of the Board. The complaint is based on a charge filed April 4, 1991, and later amended, by the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Road Sprinkler Fitters Local Union No. 669, AFL-CIO (Union, Local 669, or Charging Party) against Triple A Fire Protection, Inc. (Respondent, Company, TAF, or Triple A). Following the Board's remand, the hearing was not reopened.

In the Government's complaint the General Counsel alleges that Respondent TAF violated Section 8(a)(1) and (5) of the Act, *29 USC 158*(a)(1) and (5), when (1) Alton Turner (Turner), Company's president, bypassed the Union and dealt directly with TAF's employees by various acts between about late February 1991 and March 1991, and (2) when Steve Turner, an admitted supervisor of Company, also bypassed Local 669 about March 1991. The complaint also alleges that since about April 20, 1991 Company unilaterally (1) has ceased making fringe benefit payments required by the collective bargaining agreement (CBA) and (2) has changed the wage rates of employees covered by the CBA which expired March 31, 1991.

Aside from admitting some facts, Triple A denies any violation of the Act, alleges that the CBA was an "8(f)" prehire agreement, and asserts three affirmative defenses:

(1) the Union has never represented an uncoerced majority of Triple A's employees in an appropriate unit; (2) since March 1, 1990 [at trial TAF's counsel gives the more likely date of April 1, 1991], the Union has failed to bargain in good faith with Company; and (3) the Union waived any right it may have had to bargain over proposed changes in wage rates and fringe benefits by failing to act with due diligence.

On the entire record,[1] including my observation of the demeanor of the witnesses, and after considering (as to the remanded issues) the original briefs and the supplemental briefs[2] filed by the General Counsel (whose briefs include a proposed order and notice), Local 669 (with proposed order and notice), and Triple A, I make the following:

Findings of Fact

I. JURISDICTION

An Alabama corporation, Respondent Triple A operates from Semmes (Mobile), Alabama where it is engaged in the nonretail installation of sprinkler systems. During the 12 months ending August 31, 1991, Company purchased and received at its Semmes facility goods and materials valued at $50,000 or more direct from points outside Alabama. Respondent TAF admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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[1] Unless otherwise indicated, all dates are for 1991. References to the seven-volume transcript of testimony are by volume and page. Exhibits are designated GCX for the General Counsel's, CPX for the Union's, and RX for Respondent TAF's.

[2] By motion dated October 28, 1993, TAF sought leave to file copies of the cross-exceptions and brief which it had filed with the Board. I denied that motion in an all-party telephone conference call held November 1, 1993. At the same time I set a date for any party so desiring to mail to me supplemental briefs addressing the remanded issues.

II. LABOR ORGANIZATION INVOLVED

TAF admits, and I find, that Road Sprinkler Fitters Local Union No. 669 is a labor organization within the meaning of Section 2(5) of the Act, *29 USC 152*(5).

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

1. Collective bargaining history

Alton Turner began working in the sprinkler fitting industry about 1972 or 1973. (6:1029, 1155). At that time he joined Local 669. (6:1027). Some 10 years later, about 1983, Turner founded his own company to engage in that business, incorporating Triple A about 1983. (1:190; 2:290). Turner, who is president of TAF, holds a 51 percent majority of Company's stock and runs the business. (1:191). Turner's wife, Lovina, owns the balance of the stock and is TAF's secretary and treasurer. (7:1252-1253, 1269). She also serves as Turner's office secretary. (1:198, 215; 7:1253). Turner's son, Steve, is an acknowledged statutory supervisor for TAF. Other family members also work for TAF. (7:1253-1254).

Local 669 is headquartered in Landover, Maryland (2:319) where H.V. Simpson is the Union's business manager. (1:125; 2:319). Ronnie L. Phillips has worked 15 years for Local 669, and is a business agent of the southern district and a regional representative for the Union. His area covers Alabama, Mississippi, and Puerto Rico. Since 1983 Phillips, on behalf of the Union, has dealt with Turner respecting all matters between Local 669 and TAF. (2:299-300; 316; 4:650; 5:819).

The Union's territorial jurisdiction receives different descriptions in the record. (1:34; 2:319; 5:836-838, 855-856, 881). However, articles in the 1988-1991 national CBA (GCX 21; RX 41) for recognition (art. 3) and territory (art. 6) disclose that it covers offshore drilling operations plus 47 states and the District of Columbia, but not Connecticut (Local 676), Florida (Local 821), and the territory covered by Locals in some 18 cities. Rhode Island apparently is covered by the Providence Local. The matter of TAF's desire to be able to do business outside Alabama, particularly in Florida, arose during the negotiations between Local 669 and TAF.

For years Local 669 has entered into national CBAs with the National Fire Sprinkler Association, Inc. (NFSA). A copy is in evidence, for historical purposes only (6:1049), of the CBA for April 1, 1982 through March 31, 1985. (RX 18). In October 1983 Turner, as president of TAF, signed an interim agreement (RX 20) to be bound to the 1982-1985 contract (1:192; 6:1051), and on February 8, 1984 he signed a one-page (RX 22; 7:1288) amendment to the economic package. Turner also signed to be bound to the national CBA of 1985-1988 (GCX 20; GCX 2; 1:193-194).

Triple A, by Turner, also signed (GCX 2: 1:193-194) to be bound to the national CBA of April 1, 1988 through March 31, 1991 (GCX 21; RX 41; 2:301). As we shall see, on March 31, 1991 the 1988-1991 CBA expired as to TAF. On April 9 the Union and TAF began independent negotiations for a CBA, but after a dozen or so meetings, the last one held in July 1992, there still was no agreement for a replacement contract. The 1988-1991 CBA's recognition clause, in article 3, provided:

> *Recognition*: The National Fire Sprinkler Association, Inc. for and on behalf of its contractor members that have given written authorization and all other employing contractors becoming signatory hereto, recognize the Union as the sole and exclusive bargaining representative for all Journeymen Sprinkler Fitters and Apprentices in the employ of said Employers, who are engaged in all work as set forth in Article 18 of this Agreement with respect to wages, hours and other conditions of employment pursuant to Section 9(a) of the National Labor Relations Act.

The Board has found that Local 669 enjoys a 9(a) relationship with TAF, and that the expired 1988-1991 collective-bargaining agreement (CBA) was effective under Section 9(a) of the Act. *312 NLRB No. 162*. Thus, although TAF reurges its arguments that the CBA was an 8(f) contract and that the Union never represented an uncoerced majority of its employees, I shall not address them because the Board's decision resolves the matter at this level. Presumably TAF reurges them here because (1) the Board's remand is not an appealable final decision and (2) because TAF wants to avoid any claim of waiver.

2. Events preliminary to 1991-1992 negotiations

By letter dated December 14, 1990 (RX 5), the Union, by Business Manager Simpson, notified "All Independent Local 669 Contractors" of the Union's desire to negotiate a renewal CBA effective April 1, 1991. If a renewal contract were not reached before March 31, Simpson warned, "lawful economic action" could ensue on and after April 1. Simpson enclosed two copies "of our Assent and Interim Agreement" to consider, sign, and return. (2:413) A copy of the type of assent and interim agreement that was enclosed is separately in evidence as RX 14. (3:621-624).

Under the two-page assent and interim agreement form (RX 14) which Simpson mailed to TAF, the Union would agree not to strike to obtain a successor CBA to the one expiring March 31, 1991. The parties would agree, among other provisions, that all terms of the current CBA would remain in effect until the effective date of the successor CBA, with increases in wages and fringes retroactive to April 1, 1991.

Apparently around mid-March 1991 Simpson, Phillips testified (2:415), telephoned Phillips and informed him that Turner had failed to sign and return the Assent and Interim Agreement. On March 18 Phillips telephoned Turner and, Phillips testified, asked if they could meet to discuss negotiations for a renewal contract. Turner said he had business in Atlanta the next day. They set no date to meet. (2:302-303, 337; 3:578). With an important exception, Turner's version of the call is generally consistent with that of Phillips. (6:1086-1087). The main difference is Turner's assertion that Phillips asked whether Turner was going to sign the interim agreement. (6:1087).

At several points in his testimony Phillips clearly denies that he even mentioned the interim agreement to Turner. (2:373, 413, 417). That was before it was disclosed that Turner had tape-recorded the March 18 telephone conversation. A transcript (RX 11) of that telephone conversation was received in evidence. (3:576, 609). Later, in conjunction with other tape recordings excluded on the basis they pertained to settlement discussions of a related matter (5:780, 790), the Union moved (CPX 8; 4:641; 5:792; 6:942) to strike the transcript, RX 11. The General Counsel joined in that motion. (6:948). The Union so moves on the basis that Board policy excludes from evidence any secret tape recordings of conversations which involve contract negotiations. *Carpenter Sprinkler Corp., 238 NLRB 974, 975 (1978)*, enfd. on point *605 F.2d 60, 102 LRRM 2199, 2202 (2d Cir. 1979)*. I postponed ruling until this decision. (6:953).

The taped telephone conversation of March 18 focused on the interim agreement and when the parties could meet and discuss contract negotiations. As such topics appear to fall within the rule of Carpenter Sprinkler, I grant the Union's motion, strike Respondent's Exhibit 11, and transfer RX 11 to the Rejected Exhibits File. On the same basis I transfer RX 94 to the Rejected Exhibits File. (7:1297). RX 94 is the transcript of a tape recording which Turner secretly made of his April 3, 1991 telephone conversation with Phillips concerning the beginning of contract negotiations.

Although Phillips testified that he never asked Turner to sign an interim agreement (2:412; 3:577), he clearly asserts that he never mentioned the term (2:373, 413, 417) during the telephone conversation. Later he admits that he did mention it and that when he did so he was referring to RX 14. (3:622).

On March 19, the day following the March 18 telephone conversation, Phillips made a surprise visit to Triple A and found Turner there. (2:303, 337, 416; 6:1088). Turner testified that the Atlanta trip canceled, but concedes he did not notify the Union. (6:1168-1169). Accompanying Phillips was Clarence Radecker (2:304), a business agent from the Union's Arkansas-Louisiana District 6. (7:1339). Phillips testified that he went there to set up contract negotiations. (2:304, 340, 416). Phillips testified that Turner said he had no intention of negotiating a CBA with Local 669. (2:304, 307). (Radecker was not called as a witness until rebuttal and therefore did not address this visit.)

Turner testified that Phillips asked if Turner was going to sign the contract. Turner asked what the contract consisted of. (Jack Moiren and Alan Thames also were present.) It was not yet complete, Phillips advised. Phillips then called Turner aside and asked if Turner would go ahead and sign the (interim) agreement, that he had a copy in his briefcase in his car. (According to Phillips, 2:240, 417, neither he nor Radecker had a copy of the interim agreement with him that day.) "No," Turner responded, explaining that he would not sign a blank check. (6:1088-1090). At about that point Phillips said they had to discuss a contract. Turner said he was preparing a proposed contract to submit to him later. (6:1130-1133).

Two days later, by letter dated March 21 (GCX 22), Phillips wrote Turner. After referencing their March 18 and 19 contacts, Phillips accused Turner of refusing to bargain, expressed puzzlement at that, and suggested a need "to avert a work stoppage on April 1, 1991." Crossing that letter in the mail was Turner's letter of March 21 (GCX 7) transmitting TAF's proposal (GCX 8) for a complete contract. (1:220-222; 6:1157).

In the meantime the Union had been alerting its membership to a possible strike beginning April 1. The Union's March 1991 newsletter (RX 88) did so. Business Manager Simpson, by a Special Strike Notice To All Members (RX 6), dated March 22, advised that effective April 1 "WE ARE STRUCK" against any contractor not named on an attached list of over 200 signatory contractors. Triple A is not one of the 200-plus names. (2:427). Phillips so notified TAF's employees when he met with them shortly before April 1. (2:427; 5:920-921; 6:992-993).

By letter dated March 26 (GCX 9), Turner wrote Phillips that strike replacements would be hired and paid under the terms of TAF's proposed CBA which TAF had mailed to the Union by letter of March 21. Current employees represented by the Union would continue to be paid under the CBA "until further notice." The further notice was expressed in a separate letter (RX 89) of the same date, March 26, in which TAF notified the International Union that TAF "hereby terminates" the CBA "effectively immediately or as soon as permitted by applicable law."

On March 28 (7:1281) Turner, in a two-page memo (CPX 5), summarized the CBA status, discussed union fines and possible options for employees who desire to work, notified TAF's employees that TAF would be open for business on April 1, and would have to operate with, if necessary, new employees.

Before April 1, however, Phillips told TAF's employees there would be no strike and to report to work on April 1. (2:430; 6:993). Phillips did not notify Turner there would be no strike. (2:430). There was no strike or picketing by the Union on April 1 at TAF. (2:309, 318, 429; 6:1012-1013). Turner thought there would be a strike on April 1 (2:293), and he made preparations for a strike. (6:1094). There is no strike allegation in the complaint. TAF's position is that the strike notice bears on TAF's further position that the Union's contract demands caused an impasse. (2:432-434).

On April 3 Turner and Phillips agreed to meet for bargaining, and to hold the first session on April 9. (2:309). On April 4 Turner wrote (GCX 10; RX 98) confirming a CBA meeting for April 9. (1:227; 5:919; 6:1095). Phillips confirmed by his letter of April 5. (GCX 23; 2:310). Turner observed that although TAF had forwarded a complete contract proposal, TAF had not received the Union's counterproposal and would like to have it for review before the April 9 meeting. The next day Phillips, by his letter of April 5 (GCX 23, apparently crossing RX 98 in the mail), confirmed the first meeting date of April 9 for CBA negotiations, stated he had questions concerning

TAF's proposed contract, and asserted that he had some contract proposals of his own which he would present at the meeting.

The parties held their first bargaining session on April 9, 1991 at the Bradbury Inn in Mobile. At this point I pause only to list the dates of the ten or so meetings. I write "or so" because the parties list 13 scheduled meetings even though bargaining occurred only at 9 or 10. For example, the parties refer to one meeting date, May 21, as a meeting. Although the third meeting was scheduled for May 21, TAF's representatives arrived a few minutes late, the Union left (there is a dispute whether the Union's representatives saw TAF's representatives entering the parking lot), and no bargaining occurred until the next day, May 22. Similarly, no bargaining occurred at the eighth meeting on October 8 because Turner, who had broken a tooth the previous evening, left early for an emergency dental appointment. Finally, no bargaining occurred at the 10th meeting on January 14, 1992. There is a dispute over attendance. Accordingly, the actual 10 bargaining sessions are (plus the aborted meetings of May 21, October 8, and January 14 shown in brackets):

1. 4-9-91
2. 4-30-91
3. [5-21-91]
4. 5-22-91
5. 6-25-91
6. 6-26-91
7. 8-28-91
8. [10-8-91]
9. 11-25-91
10. [1-14-92]
11. 2-18-92
12. 3-17-92
13. 7-16-92

On April 10 the Union, by Business Manager Simpson, sent a two-page special notice (RX 104) to all members informing them that agreement had been reached for a renewal 3-year national CBA, wages retroactive to April 1 within 30 days of ratification. Phillips acknowledges that he never delivered a copy of the new (1991-1994) CBA to TAF. (3:618, 621). Although no copy of the national 1991-1994 CBA is in evidence, Simpson's April 10 announcement (RX 104) summarizes the highlights, including the increased wages and benefits, of that new contract. Following the final (and abbreviated) meeting on July 16, 1992, the Union wrote (RX 224) that it was willing to continue negotiations. TAF did not respond, and no further meetings have been held.

B. Introduction

Aside from the nature of the 1988-1991 CBA (now established to be a 9(a) CBA rather than an 8(f) contract), the complaint alleges direct dealing and unilateral changes in violation of Section 8(a)(5) and (1) of the Act. My findings follow respecting the allegations, with the direct dealing addressed first. Because the status of foremen as employees or supervisors is relevant to the direct dealing allegation, I shall make findings on that topic.

C. Job Foremen Not Statutory Supervisors

1. Introduction

Although the recognized bargaining unit under the CBA does not specify foremen (GCX 21 at 4), the CBA provides (art. 9) that foremen will be selected by the employer from its journeymen and will be paid $1.25 per hour more than the journeyman's rate. Under Article 9 of the CBA the employer must assign a foreman for each job. Selection of a foreman is the employer's province. (GCX 21 at 12). TAF contends that during the relevant time the unit included two foremen who were statutory supervisors. (1:178). Apparently the two were Jack Moiren and Cecil P. Davidson.

2. Applicable law

In assessing the facts on this issue, I am guided by the applicable law as summarized in *Adco Electric, 307 NLRB 1113 (1992)*, enfd. *6 F.3d 1110 (5th Cir. 1993)*. The first important *Adco* point I shall emphasize here is that the party asserting supervisor status has the burden of persuasion on the issue. *Id.* fn. 3 and 1119.

The second point from the *Adco* summary which I highlight here is, "Exercise of the authority which derives from a worker's status as a skilled craftsman does not confer supervisory status because that authority is not the type contemplated in the statutory definition." *Id. at 1120.*

The third point from the summary is that the powers enumerated at *29 USC 152*(11) are termed the "primary" indicia of supervisory status. When the issue of supervisory status presents a borderline question, "secondary" indicia may be considered. Nevertheless, "secondary" indicia alone will not confer supervisory status under the Act. *Northcrest Nursing Home, 313 NLRB No. 54,* slip op. at 10 (Nov. 26, 1993); *Adco* at 1120. Even the "primary" powers must be linked to the use of or need to exercise independent judgment. *Adco* at 1120.

Finally, "In these cases the Board has a duty to be alert not to construe supervisory status too broadly because the employee who is deemed a supervisor loses his protected right to organize, a right Congress intended to protect by the Act." *Northcrest Nursing Home,* slip op. at 1; *Adco* at 1120 (citations omitted).

3. Facts

Evidence on the supervisor question is quite limited, with Turner never addressing the matter when he testified. The bulk of the evidence comes from the testimony of Jack Moiren and Cecil P. Davidson, job foremen during the relevant time.

Most of the time the job foremen served as part of three-man crews, the number including themselves. As job foreman Langford in *Adco, 307 NLRB at 1124,* the job foremen here spend about 90 percent of their time working with the tools and the other 10 percent on paperwork and training their apprentices/helpers. They do not independently hire workers. Instead, the instances in which they successfully recommended that someone, usually a relative, be hired, constitute nothing more than the recommendations of skilled craftsmen referring and recommending others from a pool of qualified craftsmen. That is not indicative of statutory authority. *Adco* at 1120, 1124. The testimony by Phillip Alan Thames that he was hired by his foreman uncle, Ronnie Pugh (6:955-956, 964), does not establish that Pugh independently hired Thames. The evidence supports the equal inference that Pugh, as a skilled craftsman, simply recommended Thames and Turner authorized Pugh to hire Thames. In the circumstances here, that action does not indicate statutory authority.

Hours and overtime are matters preset by TAF. Although neither Turner would visit some of the jobs outside Mobile, their absence merely reflects the experience level of the job foremen as skilled craftsmen.

Transfers to and from the crews come at the direction of the Turners, generally after discussion with the foremen about the progress of the job. When a larger crew is downsized to fit reduced job needs, any selection of crew members by the job foremen for release back to the office for reassignment is the function of the foremen in their capacity as skilled craftsmen matching crew skills with job needs. The foremen do not resolve grievances. No evidence of disciplinary action by the foremen, exercising independent judgment, was adduced.

4. Conclusions

TAF has failed to show that the job foremen, and particularly Jack Moiren or Cecil Davidson, possessed any of the primary indicia of a statutory supervisor, or that they exercised any of those powers with independent judgment. As TAF has failed to carry its burden of demonstrating statutory supervisor status on the part of the job foremen, including Jack Moiren and Cecil Davidson, I find that at all relevant times Triple A's job foremen were statutory employees.

D. Direct Dealing

1. Alton Turner

a. Introduction

Witnesses who are either employees or former employees of Company describe the following conversations. In his own testimony, Turner does not address these conversations. I credit the Government's witnesses.

b. Complaint paragraphs 10(a) and (b)

Danny Carpenter worked for Company from February 1988 to September 1991. (1:172, 184). He became a journeyman fitter in January 1991. (1:173). He and Turner were social friends, sipping beer on a few occasions. (1:188-189). About late February 1993 to early March, Carpenter testified, as employees Carpenter, Jack Moiren, and Alan Thames were standing at the shop's doorway with Turner, Turner told the three employees that he might not sign the union contract and that he would guarantee each a foreman's job, pay their insurance, and provide them a truck.

About mid-March 1991, as Turner was visiting at Carpenter's house, Carpenter testified, Turner said he probably was not going to sign the upcoming union contract. Asking Carpenter to stay with TAF, Turner said he would raise Carpenter's pay to a foreman's rate. (1:174-175,184-186).

c. Complaint paragraph 10(c)

Jack Moiren worked at Company for about 6 years, from 1985 to September 1991. (1:65, 76, 83). For his last several years at Triple A, Moiren worked as a foreman. (1:65, 116). Moiren has been a member of the Union for about 20 years. (1:65).

About early March at the shop, Moiren testified, Turner asked whether Moiren would stay with him if Turner went nonunion. Turner said that if Moiren stayed his pay would remain at the union rate, he would receive raises when union pay rates increased, would get to keep the company truck he was driving, with gas paid, that he would be provided insurance, and something would be worked out for retirement. (1:66-67, 99-100).

d. Complaint paragraph 10(d)

Cecil P. "Shorty" Davidson has worked three different times for Company, the first from October 1985 to about October 1986, again from September 1987 to November 1987, and finally from September 1989 to August 1991. (1:40). Davidson became foreman about February 1990 (1:151), and was such in March 1991. (1:151).

About early to mid-March 1991, Davidson testified, he, Jack Moiren, Danny Carpenter, and the Turners (Alton, president and father, Steve, supervisor and son) had a lengthy conversation on the front porch of Company's office. At one point the conversation turned to the pros and cons of working union and nonunion. Toward the end of the topic, Turner told Davidson that Davidson had a job there no matter what happened, and that Davidson could have insurance by paying one half the premium. At that time Davidson paid no part of the cost of the insurance which Company provided. (1:140-142, 151-152).

2. Steve Turner

Complaint paragraph 11 alleges that about March 1991 TAF, acting through Supervisor Steve Turner, promised employees insurance and higher wages if they remained with TAF in the event TAF did not sign another contract with the Union, and impliedly promised that TAF would institute a profit sharing plan in such circumstances. Phillip Alan Thames testified in support of these allegations.

Philip Alan Thames has worked for TAF about 7 years, although he left it in August 1991 and returned about June 1992. (1:41-41, 47, 52). Thames works for Company as an apprentice fitter. (1:42). Thames describes a late March conversation in Supervisor Steve Turner's vehicle as they drove back to the shop from a job at a local bank. Turner, Thames testified, said that if Company did not sign a union contract that Thames would still have a job at $14 an hour and still have insurance. Moreover, Turner added that Company would institute either a pension or profit sharing plan. (1:44-45). Steve Turner did not testify.

3. Conclusions

Crediting the Government's witnesses, I find that, as alleged, TAF violated Section 8(a)(5) and (1) of the Act when it bypassed the Union and dealt directly with bargaining unit employees.

E. Unilateral Changes

1. Applicable law

When a collective-bargaining agreement (CBA) expires, an employer must maintain the status quo on all mandatory subjects of bargaining until the parties either agree on a new contract or reach a good faith impasse in negotiations. *Laborers Fund v. Advanced Lightweight Concrete, 484 U.S. 539, 127 LRRM 2657, 2659 fn. 6 (1988); NLRB v. Katz, 369 U.S. 736, 50 LRRM 2177, 2180-2182 (1962); Mount Hope Trucking Co., 313 NLRB No. 36,* slip op. at 1 (Nov. 23, 1993); *Bottom Line Enterprises, 302 NLRB 373, 374 (1991).*

The rights of parties in a collective-bargaining relationship differ depending on whether the parties are in a nonnegotiation setting or whether they are engaged in bargaining. *Intermountain Rural Electric Assn., 305 NLRB 783, 786 (1991),* enfd. *984 F.2d 1562, 142 LRRM 2448 (10th Cir. 1993).* As the Board wrote in *Bottom Line Enterprises, id. at* 374 (footnotes omitted; emphasis added):

> Absent exceptional circumstances, an employer may not justify a unilateral implementation of a proposal on a particular subject, submitted during negotiations for a labor agreement to succeed an expired one, on the

> ground of a union's failure to request bargaining on that subject. When negotiations are not in progress, we can find a waiver of a union's statutory right to bargain over a change in the unit employees' terms and conditions of employment on the basis of the union's failure to request bargaining if the union had clear and unequivocal notice of the proposed change and was given that notice sufficiently in advance of implementation to permit meaningful bargaining. However, when, as here, the parties are engaged in negotiations, an employer's obligation to refrain from unilateral changes extends beyond the mere duty to give notice and an opportunity to bargain; it encompasses a duty to refrain from implementation at all, unless and until an overall impasse has been reached on bargaining for the agreement as a whole. The Board has recognized two limited exceptions to this general rule: "when a union, in response to an employer's diligent and earnest efforts to engage in bargaining, insists on continually avoiding or delaying bargaining," and when economic exigencies compel prompt action. Such extenuating circumstances are not, however, present in this case.

Where, as here, a CBA has expired and the employer makes unilateral changes during negotiations for a successor CBA, the employer has the burden of demonstrating that the exceptions (impasse, delay by union, or economic emergency) apply. *North Star Steel Co., 305 NLRB 45 (1991); Control Services, 303 NLRB 481, 483 fn. 12 (1991),* enfd. mem. *140 LRRM 2248, 141 LRRM 2208 (3d Cir. 1992); Roman Iron Works, 282 NLRB 725, 731 (1987),* enf. denied on other grounds *856 F.2d 1, 129 LRRM 2229 (2d Cir. 1988).*

2. Changes implemented April 22, 1991

The parties held their first bargaining session on April 9, 1991. As for most of the meetings, notes of the Union (GCX 25) and TAF (RX 102) are in evidence. Representative Ronnie L. Phillips served as the Union's chief negotiator. (2:310). Alton Turner was TAF's chief negotiator at the first meeting, with attorney Deborah H. Kehoe, then an associate of attorney Willis C. Darby Jr., assuming that role thereafter. (2:271; 7:1228). Beginning about 10 a.m., and allowing for breaks and lunch, the meeting lasted until about 4:20 p.m. The parties proceeded on the basis of discussing TAF's proposed contract section by section, although they did not complete their discussion of all sections.

During the meeting TAF submitted a list of 23 jobs (GCX 12:3) on which it had bid but lost between April 24, 1990 and March 12, 1991 when TAF's bids were based on union wages and benefit cost levels. (2:439; 6:1096-1097, 1141-1142). The notes of neither Phillips (GCX 25 at 7) nor Kehoe (RX 102 at 6) reflect any discussion of the topic. Turner testified that he told Phillips the lost jobs reflected why TAF was having a problem being competitive. Turner does not recall Phillips' response other than Phillips showed no interest. (6:1097, 1141-1142). Nothing in the evidence indicates that Turner said that TAF was suffering an economic emergency or otherwise needed immediate economic relief in order to survive. As attorney Darby argued at trial, TAF had work, but it was losing work it should have been getting; TAF was not broke, but it was not competitive; TAF "delivered to the Union evidence that showed that we were trying to be competitive, and we were not competitive because of the rates." (6:1151-1152). Of course, operating at a competitive disadvantage does not necessarily equate to an economic emergency which would justify unilateral changes in wages, hours, or working conditions.

During the course of the first meeting Phillips submitted written counterproposals on articles 3, 4, and 25 pertaining to Recognition, Union Security, and Grievance Procedure and Arbitration. (GCX 24). As the parties proceeded through the meeting, using TAF's proposed contract (GCX 8) as a basis for discussion, they tentatively approved one or two provisions, left most open for further discussion (with Phillips saying the Union would submit counter proposals as to several provisions), and apparently never read the last two articles pertaining to a zipper clause (Complete Agreement) and the contract term. The parties agreed to meet again on April 30. Turner suggested the date. (7:1241; GCX 25 at 9; RX 102 at 10).

Two days later, on April 11, Turner mailed to the Union a proposed drug abuse policy and certain payroll data the Union had requested. (GCX 11). That was followed the next day by a letter, dated April 12, from Turner to Phillips, the text of which reads (GCX 12):

> On Tuesday, April 9, 1991, Triple A Fire Protection, Inc. presented you with a list of "Jobs Bidded, Not Awarded," a copy of which is enclosed for your convenience. Triple A Fire Protection, Inc. is continuing to bid on jobs in Alabama, Florida and Mississippi. Triple A Fire Protection, Inc. continues to bid against competitors who have a lower labor cost and who have

> no restrictions on prefabricated material or subcontracting.
>
> Although Road Sprinklers Local 669 gave notice of an intent to terminate our old agreement on December 14, 1990 and express[ed] an intent to reach an agreement before March 31, 1991, Road Sprinkler Local 669 has not submitted a meaningful proposal to Triple A Fire Protection, Inc. nor seriously addressed the March 21, 1991 proposal of Triple A Fire Protection, Inc. We can no longer tolerate your inaction or losing a majority of the jobs we bid.
>
> On Monday, April 22, 1991, Triple A Fire Protection, Inc. intends to effect the proposal [GCX 8] submitted to Road Sprinkler Fitters Local Union No. 669 [GCX 7] by letter dated March 21, 1991 unless an agreement is reached between Triple A Fire Protection, Inc. and Road Sprinkler Fitters Local Union No. 669 before Monday, April 22, 1991.
>
> Representatives of Triple A Fire Protection, Inc. are available to meet with representatives of Road Sprinkler Fitters Local Union No. 669 in an attempt to reach a mutually satisfactory agreement prior to April 22, 1991.
>
> In the event no agreement is reached with Road Sprinkler Fitters Local Union No. 669, all employees of Triple A Fire Protection, Inc. should report to their usual jobs ready to work on Monday, April 22, 1991 under the terms and conditions contained in our proposal of March 21, 1991.

Turner admits that, as best he remembers, neither he nor Kehoe said anything at the April 9 meeting of an intent to implement on April 22 TAF's proposed contract

(GCX 8) should the parties not reach a successor CBA before that date. (6:1140). No mention of such a possibility appears in the notes (GCX 25; RX 102) of either party. Kehoe confirms that neither she nor Turner mentioned it at the April 9 meeting. (7:1222). According to Turner (supposedly less than positive, "I would think," about this significant point) he decided after the April 9 meeting to implement TAF's March 21 proposed contract on April 22. (6:1165). Similarly less than positive, Kehoe believes the decision to implement came after the April 9 meeting. (7:1232).

As for what triggered TAF's implementation decision, and the decision not to wait and discuss the matter with the Union at the second bargaining session on the agreed date of April 30, Turner testified that he was losing money and "nobody seemed interested in my problem." (6:1166). Despite the important nature of TAF's asserted problem, Turner sent the April 12 implementation notice by certified mail without a contemporaneous copy by fax, yet many, perhaps most, of their communications were by fax. (6:1167). Turner did not telephone Phillips because (1) he really does not know why; (2) because previous calls to Phillips might take 2 or 3 days to reach him; and (3) because Turner was not in the habit, in their 15-year relationship, of telephoning Phillips. (6:1167-1168). Respecting the no-habit testimony, Turner apparently forgot about his many telephone calls to Phillips and to the Union which Turner tape recorded.

Phillips received TAF's implementation notice on April 16. (3:508). He did not respond specifically to TAF's notice. (2:440; 3:508). Phillips sent no specific response because he feared that Turner was trying to "set me up" for something which Phillips did not understand in view of the meeting already scheduled for April 30 (3:508), although earlier Phillips testified (2:440) that he "pretty much" understood the language of the implementation notice. Moreover, he saw no reason to change the date set for the April 30 meeting. (2:440). On April 17 Phillips wrote (CPX 6) Turner reaffirming the April 30 date and designating the hour and place. (2:441).

By letter (RX 106) dated April 26, Turner wrote Phillips (who sent no response) as follows (6:1101-1105):

> Enclosed herewith is a letter dated April 16, 1991 from Billy G. Williams, Chief Estimator, JESCO, relating to the Greil Memorial Hospital.
>
> You will notice that Triple A Fire Protection. Inc. came in second between two open shop contractors, Brendle Sprinkler Company, who was first, and Fire Protection Engineering & Supply who was third.
>
> Triple A Fire Protection, Inc. cannot effectively compete with open shop contractors in this area with the labor cost that existed in the collective bargaining agreement which expired March 31, 1991.
>
> We are still awaiting a proposal from Sprinkler Fitters 669. We trust that Sprinkler Fitters 669's proposal will address the competitive position of Triple A Fire Protection, Inc.

At the second bargaining meeting, held April 30, the Union's chief negotiator was Billy B. Littleton, a business agent from Texas (2:316, 462), substituting for Phillips who had to be elsewhere on the Union's business. (2:316; 5:819). Allowing for breaks and lunch, the meeting lasted from 10 a.m. to about 2:45 p.m. when Littleton left to catch his return flight (2:483; RXs 8, 108). Littleton concedes that Kehoe said TAF was prepared to bargain around the clock until the parties reached a successor CBA. (2:469). Littleton told Kehoe that he was not prepared to negotiate for more than that day. (2:469-470). Although the parties discussed several articles that day, it seems clear that more progress could have been made had the meeting been longer and had Phillips been present. Littleton acknowledges that he had only read TAF's proposed contract and had not studied it thoroughly, and had told Kehoe essentially that at the meeting. (2:464, 470).

During this second meeting the subject of TAF's implementation notice arose. Kehoe said that TAF had implemented its March 21 proposed contract on April 22. Littleton objected, saying that just because TAF had proposed a contract did not give it the right to put it into effect. Kehoe said that TAF's position is the former CBA had expired and that TAF did have the right to implement its proposed contract and that it had properly notified the Union of its intent to implement its proposed contract. Littleton replied that the Union and TAF have a 9(a) relationship and that TAF is required to bargain with the Union on the terms and conditions of the expired CBA until the parties reach either a new agreement or an impasse. Kehoe responded that TAF had implemented its (March 21) proposed contract on April 22. (2:464, 469, 484-494; RX 8).

Kehoe asserts that Littleton simply stated, on two or three occasions, that TAF was bound by the contract between the Union and the National Fire Sprinklers Association. (7:1199, 1216-1217). Even so, on cross examination by the Union, Kehoe acknowledges that Littleton objected to TAF's implementation of the proposed CBA and said that implementation would be an unfair labor practice. (7:1237). Kehoe's notes confirm the reference to an unfair labor practice and that the Union would file a charge. (RX 108 at 3). According to Kehoe's notes, at the meeting TAF's position was that it would agree that any successor CBA would be retroactive to April 22. (RX 108 at 3). Kehoe testified that the Union did not ask that TAF postpone implementing its March 21 proposed contract (7:1199). (Presumably TAF meant the question and answer to be that the Union did not ask TAF to rescind the April 22 implementation and then postpone reimplementing its March 21 proposed contract.) To the extent Littleton and Kehoe differ, I credit Littleton.

Implementation actually was not unit-wide, for Turner testified that TAF did not apply the new (and lower) wage rates to individuals on the payroll before the CBA expired. (6:1129, 1168). The record reflects that TAF hired new employees in May under TAF's implemented proposal. (2:286-287). As TAF's trial attorney, Willis Darby, expressed it at trial, "these were the first employees we hired under those circumstances." (2:283). Turner confirms, for example, that Joey Lawshe (hired May 7 at $11 per hour) was hired and worked as a sprinkler fitter employee. (2:273, 276). There is no showing that Lawshe's $11 per hour, which apparently fell within the general range of apprentice pay under the expired CBA, was different from what he would have been paid under the expired CBA. Nevertheless, any question is satisfied by TAF's answer to the complaint and by attorney Darby's admission that TAF in fact did hire employees "at rates other than those in the past agreement. . . . There's no dispute. We told the Labor Board that a long time ago. No dispute whatsoever. . . . I'm telling you we did it." (2:281). Phillips testified that TAF's March 21 proposed contract would (if implemented) have effected substantial reductions. (5:876).

Complaint paragraph 13 alleges that since about April 20, 1991 TAF has changed the wage rates of employees covered by the expired CBA. In its October 8, 1991 answer TAF states:

> Triple A denies the averments of paragraph 13 of the complaint, except Triple A admits that pursuant to prior notice to the Union all employees employed by Triple A after April 21, 1991 have been employed in classifications that were not specifically named in the expired 8(f) prehire agreement at wage rates that were not specifically established by the expired 8(f) prehire agreement; none of the wage rates of employees who were employed prior to the expiration of the 8(f) prehire agreement have been changed.

Respecting fringe benefit payments, Turner admits (6:1168) that as of April 22, 1991 TAF ceased making payments to the health, welfare, and pension funds. Complaint paragraph 12 alleges that since about April 20, 1991 TAF has ceased making the fringe benefit payments required by the expired CBA. TAF's October 8, 1991 answer asserts:

> Triple A denies the averments of paragraph 12 of the complaint, except Triple A admits that

> pursuant to prior notice to the Union all employees employed by Triple A after April 21, 1991 have been employed in classifications that were not specifically named in the expired 8(f) prehire agreement at wage rates that were not specifically established by the expired 8(f) prehire agreement; none of the wage rates of employees who were employed prior to the expiration of the 8(f) prehire agreement have been changed.

In view of this evidence, the General Counsel prima facie has established that TAF's unilateral changes are, as alleged, violative of Section 8(a)(5) of the Act. I turn now to TAF's defenses.

F. TAF's Defenses

1. Introduction

TAF advances several defenses, in addition to its 8(f) contention, either in its answer (no uncoerced majority; refusal to bargain; waiver) or at the hearing (impasse). The Board's October 19, 1993 order remanding, *Triple A Fire Protection, 312 NLRB No. 162,* rejected the 8(f) contention and the defense of no uncoerced majority as being untimely raised. TAF again advances these defenses, presumably as a precaution deemed necessary to preserve its position for any appeal. Contrary to TAF's position at trial (5:778-779), Section 10(b) of the Act applies to TAF's affirmative defenses. *NLRB v. Viola Industries-Elevator Div., 979 F.2d 1384, 1387 (10th Cir. 1992)* (defense of coercion); *Brower's Moving & Storage, 297 NLRB 207, 209 fn. 11 (1989),* enfd. mem. *914 F.2d 239, 135 LRRM 3176 (2d Cir. 1990)* (majority status); *Morse Shoe, 231 NLRB 13 (1977),* enfd. *591 F.2d 542, 100 LRRM 3008, 3010 (9th Cir. 1979)* (majority status). Accordingly, I shall not now address the untimely and Board-rejected defenses of 8(f) and majority status.

As mentioned, TAF advances the affirmative defenses of impasse and no intent by the Union to enter into a CBA. The General Counsel and the Union objected to the relevance of anything beyond the April 22, 1991 date of the unilateral changes. (2:343; 3:589-593). TAF offered the evidence for all purposes. (3:597). Although initially I ruled that TAF could offer such evidence during its case in chief (2:343, 411), I subsequently (3:597) modified the ruling so as to limit receipt of the evidence to the issue of remedy, based on *Dependable Maintenance Co., 276 NLRB 27 (1985)*. Citing later decisions by the Board, the General Counsel argues that a limited remedy is unwarranted because TAF never bargained to a good faith impasse, and the Union argues (Supp. Brief at 8-10) that Dependable Maintenance is inapposite.

Finding Dependable Maintenance controlling, I shall review the post-April 22, 1991 meetings, and all the record evidence (other than the rejected evidence), for the purpose of determining whether the parties bargained to a good faith impasse at some point after TAF's unilateral changes of April 22, 1991. Events after April 22 are not relevant to whether any unlawful unilateral changes were implemented on April 22.

2. Waiver

Referring initially to the first bargaining session of April 9, 1991, TAF contends that the Union waived any complaint it had about the changes implemented on April 22 because the Union failed (at the April 9 meeting) to request TAF to bargain about them after receiving notice of the intent to implement them by TAF's letter of "March 26." (Supp. Brief at 22, 58). TAF has confused the March 26 notice (GCX 9) about intended payment to any strike replacements (no strike occurred in April) with TAF's April 12 letter (GCX 12, quoted earlier), sent after the April 9 meeting, in which Turner advised Phillips that TAF's proposed contract of March 21 would be implemented on Monday, April 22 unless a new CBA was reached beforehand. As noted earlier, Phillips did not respond to TAF's notice of implementation. Also as already described, at the second bargaining session, held April 30, Littleton objected when Kehoe said that the March 21 proposed contract had been implemented on April 22. Littleton said the parties had a 9(a) relationship, that TAF was required to bargain over terms of the expired CBA until a new agreement or impasse was reached, and that any implementation would be an unfair labor practice over which the Union would file a charge. I find TAF's waiver defense to have no merit. *Bottom Line Enterprises, 302 NLRB 373, 374 (1991).*

3. Impasse on or before April 22, 1991

a. Legal test

A bargaining impasse occurs when good faith negotiations have exhausted the prospects of reaching an agreement. *Taft Broadcasting Co., 163 NLRB 475, 478 (1967).* Further, *id.*:

> Whether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations are all relevant factors to be considered in deciding whether an impasse in bargaining existed.

Adopting quoted language, the Supreme Court wrote in *Laborers Fund v. Advanced Lightweight Concrete, 484 U.S. 539, 127 LRRM 2657, 2658 fn. 5 (1988):*

> Given the many factors commonly itemized by the Board and the courts in impasse cases, perhaps all that can be said with confidence is that an impasse is a "state of facts in which the parties, despite the best of faith, are simply deadlocked."

The Supreme Court's quote of "simply deadlocked" comes from Gorman, Labor Law 448 (1976), which in turn quotes the language from *NLRB v. Tex-Tan, 318 F.2d 472, 482 (5th Cir. 1963).* Recall that (contrary to TAF's position, 2:357) impasse is a defense, and the party asserting that defense has the affirmative burden of establishing impasse. *North Star Steel Co., 305 NLRB 45 (1991); Control Services, 303 NLRB 481, 483 fn. 12 (1991),* enfd. mem. *140 LRRM 2248, 141 LRRM 2208 (3d Cir. 1992); Roman Iron Works, 282 NLRB 725, 731 (1987),* enf. denied on other grounds *856 F.2d 1, 129 LRRM 2229 (2d Cir. 1988).*

b. No impasse existed

Arguing impasse, TAF lists several asserted indicia, most of which are events which predate the first bargaining session of April 9, 1991. TAF does not contend that the April 9 bargaining itself was exhausted on any issue. As the first session merely saw the parties making an initial reading, with preliminary discussion, of TAF's proposed contract, it is clear, and I find, that no bargaining deadlock had occurred on any issue, much less on any issue which blocked negotiations generally. Bargaining had just begun. Discussion had been exhausted on nothing. There was no bargaining impasse when the unilateral changes were implemented on April 22, 1991.

4. Bad faith of the Union

a. Introduction

What TAF really seems to be arguing (and does argue in many respects) is that an impasse existed from the first day of April 1 (1:40; 2:341, 356, 370; 3:626; 5:766; Brief at 95, 98; Supp. Brief at 42) because the Union came to the bargaining table on April 9 with (1) the fixed intent to obtain only a CBA which adopted or mirrored the national agreement (1:35, 39-40; 2:369; 5:766, 769; 6:1035) and (2) to achieve this goal, submitted its own proposals piecemeal (Brief at 70, 72, 96; Supp. Brief at 44, 46 fn. 35, 56).

b. Piecemeal bargaining

Although TAF fails to cite cases or articulate the vice of piecemeal bargaining, the Board finds such a tactic indicative of bad faith bargaining because it frustrates the bargaining process. *E.I. Dupont & Co., 304 NLRB 792 fn. 1 (1991); Sacramento Union, 291 NLRB 552, 556 (1988).* Citing

Rockingham Machine-Lunex Company, 255 NLRB 89 fn. 2 (1981), the General Counsel and the Union assert that the Union's failure to provide all of its proposals sooner was merely reflective of a format of bargaining from TAF's proposed contract, and such a format is not violative of the Act. Rockingham, however, apparently involved an agreed format. Although TAF did not refuse to bargain in protest, it frequently requested a complete proposed contract from the Union. Not until the end of the last bargaining session did the Union comply, or substantially comply, with that request. I therefore find that the parties were not bargaining from TAF's proposed contract as some agreed format.

Nevertheless, I find no merit to the piecemeal-bargaining defense because there was only a single meeting before the unilateral changes. Evidence about the subsequent meetings was received on the limited basis of its relevance to any remedy. (3:597).

c. National contract only

TAF's theory of bad faith by the Union is that the Union, in its secret desire to obtain a mirror image of the national contract, came to the bargaining table with the intent to prolong negotiations and, by time consuming and expensive negotiations, grind TAF into the dust of poverty. (5:766, 840-842). So squeezed by the adverse economics imposed by the Union's tactics, TAF eventually would be forced to capitulate or to go out of business.

Aside from remarks during settlement discussions (offer-of-proof evidence rejected by me at trial, 5:773, 779, 784, 792, 840-842; 6:943, 1024; RX 76 at 13, 26; RX 228; CPX 8), there is some testimony by Phillip A. Thames which possibly can be interpreted as supporting TAF's theory. Thames was working for TAF during the spring of 1991. Several days after April 1, apparently during April 1991, Thames attended a union meeting at which Phillips spoke. At the meeting Phillips told TAF's employees that TAF was not going to sign the agreement [presumably the interim national agreement], but for the employees to remain working at TAF until told otherwise. Phillips said that would keep "everything in court," and would "keep negotiations going." And as long as negotiations were in progress, Phillips told them, "Triple A would have to spend money." The longer they negotiated, Phillips added, "the more money Triple A would have to spend in court." (6:994-996).

In rebuttal, Phillips testified that he met with the employees (several times, apparently) to keep them abreast of matters. He informed them (sometime around May 1, apparently) that he did not know how long the independent negotiations with TAF would take, and that he wanted them to stay on the job as long as possible because the Union was there to get a contract, to reach impasse, or strike, or whatever. The Union would be there "for however long it took." Denying that there was any reference to costs in dollar amount, Phillips asserts that he told the employees the process would be expensive for both the Union and for TAF. (7:1165-1167). At no point in his rebuttal testimony does Phillips address the specific issue of whether he stressed to the employees that the longer negotiations took the more money TAF would have to spend.

Thames was a credible witness. Although he does not report how or whether Phillips explained the reference to "court," the discrepancy is immaterial. I am persuaded, and find, that Phillips told the employees that their remaining on the job would keep the negotiations in progress, and that as long as negotiations were in progress TAF would have to spend money. Despite this finding, such a statement is a bit ambiguous. It can be interpreted two ways. First, it is nothing more than Phillips' observing that solidarity by the employees' remaining on the job combined with the expense to TAF to negotiate would apply economic pressure to TAF and persuade TAF to agree to a CBA favorable to the employees. Nothing is unlawful with such a tactic. Second, the statement can be interpreted as implying that the Union wanted to break TAF financially unless, possibly, TAF satisfied some demand of the Union. This interpretation is a stretch. Of the two, the first interpretation is less complicated and more natural. I find that it represents the message Phillips sought to convey. Hence, no unlawful motive or object is reflected in Phillips' remarks, as quoted by Thames, or in the message I have found Phillips expressed that day.

d. Conclusion

In light of these findings, I now find without merit TAF's defense that the Union, before April 22, 1991, bargained in bad faith and with no intention of entering into a CBA other than one which mirrored the national CBA. As of April 22 the evidence falls far short of showing any such intention on the part of the Union.

5. Economic emergency

As I summarized earlier, at the April 9 meeting Turner submitted to the Union a list of 23 jobs on which TAF assertedly had bid, but lost, between late April 1990 and mid-March 1991. Turner testified that he told Phillips that TAF was having a problem being competitive. Statements at the hearing by attorney Darby are to the same effect. Over objections to relevance, TAF introduced copies of its federal income tax returns for 1990 (RX 235) and 1991 (RX 236) for the dual purpose of (1) substantiating its bargaining position of being at a competitive disadvantage and (2) respecting any remedy. (7:1259-1263), 1274-1278). Turner did not prepare them and could give practically no information about the financial details. (7:1269-1272). The 1990 return shows a profit and the 1991 return shows a loss. The 1990 return was not submitted to the Union at the April 9 bargaining session (and perhaps had not yet been filed), and the 1991 return was still a year in the future as of April 9, 1991. Thus, the objections to relevance should have been sustained respecting the merits. To the extent the returns bear on any remedy, they are in evidence.

In any event, the law is well-settled that economic necessity does not authorize an employer to make unilateral changes at midterm of a collective bargaining agreement (CBA). *Stevens & Associates Construction Co., 307 NLRB 1403 (1992).* As earlier noted, the parties must maintain the status quo during negotiations for a renewal agreement. During contract negotiations an employer may avoid having to open its financial records if its position is one of competitive disadvantage rather than an inability to pay the Union's economic demands. *Beverly Enterprises, 310 NLRB 222, 226-227 (1993),* citing *Nielsen Lithographing, 305 NLRB 697 (1991).* Thus, it appears that the position which TAF expressed on April 9 fell short even of requiring it to open its financial books. And whatever dire financial emergency would have to exist to justify unilateral changes under the law, it is clear that TAF failed to show such here. Accordingly, I find TAF's economic emergency defense to be without merit.

G. Events After April 22, 1991

1. Description

As I have noted, evidence of events after the April 22, 1991 unilateral changes was restricted to whatever bearing it would have on any remedy. (3:597). Aside from two aborted meetings, May 21, 1991 and January 14, 1992 on which TAF focuses, testimony about other meetings is limited, with the parties relying principally on the summaries or notes the representatives prepared. At this point I note that TAF, blaming the Union for walking out before there could be meetings on May 21, 1991 and January 14, 1992, never articulates the significance of these events. Presumably TAF contends it shows that the Union was not really interested in reaching an agreement and was engaging in delay as a tactic in order to force TAF to sign a mirror image of the national contract. However, I find that the missed meetings are largely immaterial in light of the meetings which followed. The question is whether the parties bargained to impasse after April 22, 1991. I find the answer to be no.

Much earlier in this decision I listed the dates of the 10 actual bargaining sessions, plus the dates of 3 sessions which failed to occur as scheduled because one of the parties arrived late. Beginning with the second meeting on April 30, 1991, and extending to the 10th bargaining session on July 16, 1992, it is clear that the parties freely discussed contract articles. The meetings generally lasted several hours, beginning about 10 a.m. and ending usually about 3 p.m., with a break for lunch. At different times the Union submitted one or more individual articles as part of its overall proposal. Not until the end of the last meeting, however, did the Union submit what apparently comprised the balance of its overall proposed contract.

If there is one theme which runs through all these months, it is TAF's constant effort to obtain from the Union a complete proposed contract so that bargaining would not be piecemeal. By oral request and by letter, on many occasions, TAF so requested. The Union generally ignored such requests, or said it would propose as it saw fit, until near the end. A secondary impression also is created by the evidence. It is that conduct and statements by TAF and the Union during the negotiations suggest that neither party was all that concerned with the time that had elapsed since bargaining began on April 9, 1991, yet the parties apparently are not close to a new contract.

The meeting scheduled for May 21 at 10 a.m. at the Bradbury Inn was not held. It appears that the Union representatives were on time but TAF's representative were late. The desk clerk, Elizabeth A. Isbell, informed the union representatives that TAF had called and would be just a few minutes late. This was about 9:53 a.m. At the request of the union representatives (Phillips and Radecker), Isbell made a note (RX 134) advising TAF that the Union had been present and would send a letter. At 10:05 a.m. TAF's representatives appeared at the desk. (RX 134a; 5:755, 759-761). Phillips denies that a motel clerk gave him such a message. (5:829). I do not believe Phillips on this, and I find Isbell a credible witness. Although Isbell did not identify Phillips as the person she told, I find that it was Phillips. There also is credible evidence that the parties actually saw one another in the parking lot as the Union was leaving and TAF arriving, yet Phillips and Radecker did not turn back. By fax later that day the parties agreed to meet the following day at 10 a.m. at the Days Inn motel. (RX 133).

The parties sent each other letters protesting the aborted meeting of May 21, with Turner's May 21 letter (RX 132) covering more details and Phillips' (RX 135) accusing Turner of being rude for failing to show. Although I find it immaterial to the result, I find that the Union left the motel with notice that TAF was on the way and that in the parking lot the Union saw TAF's representatives arriving but departed anyway.

The following day, May 22, the parties held their third meeting from about 10 a.m. to about 3 or 3:30 p.m. At the beginning of the meeting Kehoe asked if the Union had brought any written proposals. Phillips said that the Union was there to negotiate. Phillips testified that it was not his manner of bargaining to submit a complete proposed contract at the first meeting (2:344) (and presumably not at any early meeting). During the meeting the parties, progressing through TAF's proposed contract, discussed several articles, reaching tentative agreement on some sections. During the meeting the Union submitted its proposals for articles 10 (inspection), 18 (jurisdiction of work), and 17 (working within jurisdiction of other sprinkler unions).

In correspondence before the fourth meeting, TAF again requested, by letter dated May 30 (RX 141), "a complete proposal from" the Union. Phillips' reply of June 5 (RX 142) addressed a date for the next meeting, but not the matter of a complete proposed contract, and Turner noted this is his responding letter (RX 144) of June 6.

The fourth meeting was held June 25. The notes (GCX 35; RX 152) reflect that the meeting lasted from shortly after 10 a.m. (Turner arrived about 10 minutes late) until around either 4 p.m. or 5 p.m. Littleton substituted for Phillips, with Clarence Radecker assisting. The parties devoted most of their time to discussing articles 2 (leave of absence), 3 (union representatives and stewards), 4 (grievances), and the Union's 10, 17, and 18.

The parties met the following day, June 26, for their fifth session. Notes by Kehoe are in evidence. (RX 154). Littleton again substituted for Phillips. Discussion again covered several hours and centered on articles 3 and 4. Toward the end of the meeting Kehoe states that TAF is prepared to accept the Union's proposed grievance steps 1, 2, and 3 if the Union agrees to TAF's article 4 section 7, provided the Union removes the reference to the National Fire Sprinkler Association (NFSA). Littleton, as Kehoe's notes record (RX 154 at 10), replied that removal of the reference to NFSA already had been agreed to. Littleton's reference echoes his testimony (2:463, 471-472) that at the second meeting, April 30, he had assured TAF that the Union was willing to strike references to NFSA so that the CBA would be between the Union and TAF.

Before the sixth meeting on August 28, TAF, responding to a grievance letter from the Union, wrote Phillips, by letter dated July 19 (RX 157):

> I trust that you realize that it is virtually impossible for us to reach an agreement with Local 669 when after three and one-half months Local 669 has not made its full requirements for a new agreement known.
>
> Your proposed meeting during the week of August 19, 1991 may be the last, unless and until Local 669 evidences an intention to negotiate a new agreement by submitting a complete proposal; i.e., the requirement of Local 669 for an agreement.

Letters by Turner in August repeated his request, without success. (RXs 163-165). Advising the Union of the location for the August 28 meeting, TAF, by letter faxed on August 20, wrote (RX 167):

> Once again we urge you to submit the counter proposal of Local No. 669 to the complete proposal of Triple A submitted to you by letter dated March 21, 1991.

In his August 20 letter Turner also said that TAF would be prepared to discuss TAF's rule about drinking on the job.

Phillips, assisted by Clarence Radecker, again represented the Union at the August 28 meeting, with Kehoe and Turner present for TAF. Most of the meeting was consumed with a discussion about TAF's rule about drinking. Around 2 p.m. Kehoe presented the Union with TAF's proposal for a new policy regarding drugs and asked if the Union had a proposal for such. Phillips said that the Union did have a drug policy which "I shall present to you when we feel it is appropriate." (GCX 38 at 3, Phillips' own notes; RX 170 at 6). Although Kehoe wanted to discuss the drug policy, Phillips declared the meeting ended for that day. (RX 170 at 7).

By letters faxed after the meeting the parties were unable to agree to meet the next day. A brief strike at this time was resolved. On September 19 and 20 the parties exchanged letters (RXs 178, 179) concerning the next meeting date, with October 8 one of the dates. By letter dated September 30 (RX 181), Joseph G. Norton, the Acting Regional Director for NLRB Region 15, notified the Union that certain of its charged allegations in the instant case had either been withdrawn with the Region's approval or dismissed, but that such action did not affect the outstanding (September 27) complaint allegations.

Although the parties gathered for their scheduled meeting on October 8, the meeting did not commence because Turner had to leave after a few minutes to see his dentist concerning a tooth Turner had broken the evening before. Kehoe said she could not meet without Turner's being present. They decided to resume at 2 p.m. that day. About 1:55 p.m. Kehoe reached Phillips at his motel room and explained that Turner had mistakenly thought his appointment was for 10:45 a.m. when in fact it was for 1:30 p.m. and that she did not know where he was. She asked Phillips to wait in his room for her to call back. Phillips declined to do so, saying that he would be in contact for a future meeting. (7:1361-1363, 1382; GCX 39;

RX 183). An exchange of letters followed with Phillips, on October 11 (RX 184), expressing dismay and suggesting that TAF had intended to stall the negotiations by having Kehoe not continue in Turner's absence, assisted by someone else from TAF. Phillips also said that the Union's representatives arrived with "numerous proposals and counterproposals, including economic proposals, to offer Triple A, and were looking forward to a productive good faith bargaining session." Turner's October 15 reply (RX 186) rejects the Union's accusations, offers his explanation of the events, apologizes for the delay his "dental emergency" caused, lists dates, and concludes by asking for copies of the Union's numerous proposals.

The seventh actual bargaining session was held November 25, the last meeting in 1991. The regular four representatives were present, with the meeting lasting from about 10:30 a.m. to about 3 p.m., with lunch from about 12 noon to about 1:30 p.m. Before the meeting actually began the Union gave TAF the Union's proposed article on a drug policy, article 41. TAF's drug proposal was discussed at some length. Union access to the job and the job steward's duties under article 3 also were discussed before lunch. Just before lunch Phillips tendered a copy of the Union's article 45 (number and location of projects). After lunch the parties discussed an earlier request by TAF for copies of other agreements, then they resumed on the drug policy. Random testing and searches also were discussed, as were over-the-counter drugs. The parties briefly discussed helpers and job training. Toward the end of the meeting the Union tendered its proposed articles 8 (extra contract agreements), 19 (welfare fund), 34 (materials and equipment fabrication), 42 (process of assembling), 45 (number and location of projects), and 48 (management rights). (GCX 36; RX 192).

The next meeting was scheduled for January 14, 1992. By a six-page letter to Phillips dated January 10 (RX 194), Turner requests the Union to furnish numerous items for the bargaining session. Much of this relates to whether credit was given to TAF's employees covered by the welfare fund and to a settlement the parties had reached earlier. However, Turner goes into this topic by observing that the Union's article 19 (welfare fund), proposed at the last meeting, specified a first year payment of $3.15 per hour to the National Automatic Sprinkler Industry (NASI) welfare fund.

Another testy dispute prevented the parties from meeting on January 14. Phillips, Radecker, and a third representative (E.M. Hays) were present for the Union. Phillips testified, and his notes (GCX 40) reflect, that Turner was present but (about 9:55 a.m.) said he did not know where Kehoe was and suggested they could do nothing without her except schedule the next meeting. Turner supplied certain drug documents. According to Phillips' notes, the parties left at 10:20 a.m. when Kehoe never arrived. (7:1364-1365). The notes, and Phillips' testimony, do not describe what occurred between about 10 a.m. and 10:20 a.m.

TAF's version is different. Turner testified he told Phillips that Kehoe was on her way but had been delayed because a printer was malfunctioning in producing data the Union had requested. Turner supplied TAF's [revised] drug policy to Phillips. Phillips left a few minutes later. Within 8 to 10 minutes, shortly after 10 a.m., Kehoe arrived. (7:1256-1258, 1273-1274). Turner's post-meeting account, his letter of January 17 to Phillips, puts the Union's departure at 10:02 a.m. and Kehoe's arrival at 10:08 a.m. (RX 197). Kehoe concedes she was late for the meeting. (7:1225). I credit TAF's version.

In his January 17 letter, Turner forwarded to Phillips the contract sections which Kehoe had brought for delivery to the Union 3 days earlier. Turner then describes the proposals, which pertain to medical insurance which, in the absence of agreement, will be placed into effect February 1, 1992. Turner also states that TAF was prepared to accept the Union's articles 8, 42 in substance, and 45. Turner again requests copies of the Union's other CBAs. By his letter of January 31 (RX 200a) to Turner, Simpson forwarded a copy of the welfare trust agreement. He declined to furnish copies of contracts with other employers as being irrelevant, pertaining more, apparently, to a fishing expedition by TAF "in support of your baseless unfair labor practice charges."

On February 18, 1992 the eighth actual bargaining session was held. It was the first of the three meetings conducted in 1992. Phillips and E.M. "Mike" Hays represented the Union, with Kehoe and Turner present for TAF. The meeting began about 10 a.m. and extended beyond 3:30 p.m. with an allowance for lunch. (GCX 41; RX 203). The parties discussed a variety of the contractual articles. The Union's notes (GCX 41) for the meeting take 11 pages and Kehoe's notes (RX 203) extend to 18 typed pages. Although all was not sweetness and light at the meeting, it is clear that, overall, progress was made. As the meeting concluded, Phillips handed TAF the Union's proposals for wages, article 7, and job foremen, article 9.

(GCX 41 at 11; RX 203 at 18; RX 9 at k). Phillips acknowledges that the Union's proposed wage rates are higher than those in the national contract, explains that he pegged them at that level for bargaining purposes, and asserts that he was flexible on the levels. (5:881-882).

The penultimate meeting, the ninth actual session, was held March 17, 1992. Phillips and David Lewis represented the Union, with Kehoe and Turner present for TAF. The meeting began about 10 a.m. and extended beyond 2:30 p.m. (Kehoe's typed notes put the conclusion at 1:36 p.m., apparently an hour off.) The parties discussed a variety of proposed articles, including insurance and management rights before lunch. After the noon break they launched into the Union's proposal on wages. TAF described its problem of being competitive with open shop contractors. Kehoe also pointed out that the Union's article 7 proposed various funds whereas TAF's article 7 does not. Other sections of the wage proposal were discussed. Most of the discussion concerned TAF's objections to the Union's wage proposal. Toward the end of the meeting Kehoe reached the Union's article 9. After limited discussion on it, Phillips said he had had enough for the day and the meeting ended.

Not until June did the parties correspond concerning arranging their next meeting. (RXs 212, 214). By his letter (RX 215) of June 9 Turner concludes by requesting an advance copy of any proposal the Union intended to make at the next meeting. On June 22 Turner, after discussing proposed dates, wrote Phillips (RX 217) that:

> It is my understanding that Road Sprinkler Fitter Local Union No. 669 is entering into a settlement agreement with the National Labor

> Relations Board wherein Road Sprinkler Fitters Local Union No. 669 has agreed that "United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Road Sprinkler Fitters Local Union No. 669, AFL-CIO . . . WILL NOT refuse to bargain in good faith with Triple A Fire Protection, Inc., . . . by the piece-meal submission of our contract proposals, while failing and refusing to submit a complete contract proposal."
>
> Triple A Fire Protection, Inc., hereby requests that United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Road Sprinkler Fitters Local Union No. 669, AFL-CIO "submit a complete contract proposal" to Triple A Fire Protection, Inc., forthwith and in no event not later than two (2) business days prior to our next scheduled meeting.

Correspondence about dates continued. Finally, the following exchange occurred, in conjunction with an agreement to meet on July 16. Turner, by letter of July 6, requests a "complete contract proposal not later than Monday, July 13, 1992, in order that we may have an opportunity to review it before our meeting of Thursday, July 16, 1992." (RX 219). By his letter of July 9 to Turner, Phillips, expressing his intent to negotiate as long as TAF bargains in good faith, advises that the Union "desires to propose items in addition to the proposals already on the table." Phillips also states that he will make every effort to forward these proposals to Turner before the July 16 bargaining session. "At any rate I will bring all proposals concerning such additional items to our meeting." (RX

220). An updated list of the bargaining unit, requested by Phillips on July 9, was furnished by Turner's letter of July 10. (RX 221).

The 10th and last meeting took place July 16, 1992. Phillips and David Lewis represented the Union, with Kehoe and Turner present for TAF. The agreed starting time was 10 a.m. There is no question that shortly before 10 a.m. Kehoe asked Phillips if the Union had a complete proposal. "When the meeting gets started, I will present you a proposal." Phillips responded. (7:1336; GCX 34 at 1; RX 223 at 1). After some silence, talk ensued on unrelated events, focusing on coffee which arrived about 10:35 a.m. Again Kehoe requested the Union's complete proposed contract. Phillips responded that he had proposals to submit in his good time. He then protested that TAF had not made counters to the Union's proposals, including apprenticeship. Again Kehoe asked for the Union's complete contract that TAF could sign. Phillips said he was willing to sign if they reached agreement that day. Kehoe repeated her question. (RX 223 at 2).

Phillips then tendered the Union's article 5, a one-page article concerning hiring, and, as Lewis testified, Phillips "commenced to start reading what was in article 5." (7:1336; RX 223 at 3). Kehoe went into a "trauma," Lewis testified, saying she did not want piecework, that she wanted a complete proposal. (7:1336). Phillips continued reading the entire article, told Kehoe she was excused, and asked Turner whether he accepted the Union's article 5. At that point Kehoe said that TAF saw no point in further bargaining concerning the Union's piecemeal submission of its contract proposals. She said the meeting was adjourned until the Union submitted a complete contract proposal with TAF having an opportunity to review it. She asked when TAF could expect it. Rising, Phillips tendered to Kehoe several articles (6, 11, 12, 13, 15, 16, 20, 21, 23, 24, 26, 29, 30, 31, Addendum, a total of some 27 pages), saying, "Here's your complete contract proposal. You have officially been presented with a contract. When you're ready to negotiate, call us." As the Union representatives turned to leave, Kehoe said the meeting was adjourned to July 20. Phillips responded that she did not tell them when to meet, that she had ended the meeting, and that they would be in touch. They left about 10:45 a.m. (7:1337; RX 223 at 3).

At trial Phillips was asked about not wanting Kehoe to be able to review the Union's proposals in the privacy of her office. Phillips answered that he was not aware of any requirement that he do so, and that he had followed his understanding of what negotiations were all about. (7:1378-1379). Phillips admits that frequently during negotiations he "may have" read (aloud) a union proposal to Kehoe and Turner before handing the document to them. (7:1379). Asked why he waited from April 1991 to July 16, 1992 to present the Union's proposal for the hiring of men (article 5), Phillips testified, "That was just the way I felt I should proceed in negotiations." (5:867).

Following the meeting, Phillips wrote Turner a letter, dated July 16, expressing dismay that Kehoe, rather than showing a willingness to discuss the Union's proposals, had adjourned the meeting while attempting to dictate the date for the next meeting. Phillips concludes by stating the Union's willingness to meet, requesting Turner to contact him "so we can agree on a future date to meet."

(RX 224). There has been no further contact between the parties concerning resumption of negotiations.

2. Discussion

Even if the Union's piecemeal bargaining would constitute, if alleged, an unfair labor practice, or bad faith here, the question remains whether the parties deadlocked over anything. The answer is no. Kehoe herself was ready to meet on July 20, and the Union's last request was for further negotiations. The cause for the lack of further negotiations has been TAF's refusal to answer the Union's request to meet.

Negotiations have been extensive, but not exhaustive. Granted, at times each party has acted in a manner suggesting that it is not overly concerned with whether the parties ever reach an agreement. But TAF fails to point to a single contract topic on which negotiations have come anywhere near to stalling, even as to that one item. At no point has either party expressed a final position on anything. They have not summarized the status of their negotiations, and have not exchanged a list of topics of tentative agreement and topics open. In short, I find that as of July 16, 1992, and as of the date of the trial, bargaining was not deadlocked on any topic, much less overall. No impasse was reached after the unilateral changes of April 22, 1991.

Conclusions of Law

1. At least since October 1987 the Union, Sprinkler Fitters Local Union No. 669, has been the Section 9(a)

exclusive bargaining representative of TAF's employees in a bargaining unit currently described as:

> All Journeymen Sprinkler Fitters and Apprentices employed by Triple A Fire Protection, Inc. who are engaged in all work as set forth in Article 18 of the national agreement of 1988-1991.

2. By various acts in February 1991 and March 1993, TAF violated Section 8(a)(5) and (1) of the Act by bypassing the Union and dealing directly with unit employees concerning wages, hours, and working conditions.

3. TAF violated Section 8(a)(5) and (1) of the Act when effective April 22, 1991 it unilaterally ceased making required fringe benefit payments to established benefit plans.

4. TAF violated Section 8(a)(5) and (1) of the Act when effective April 22, 1993 it unilaterally reduced the wage rates for bargaining unit employees hired on or after April 22, 1991.

5. At no point in the contract negotiations after April 22, 1991 did the parties reach a deadlock, or impasse, in the bargaining.

6. The foregoing unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Although TAF is a small employer and, as of the hearing, apparently in poor economic circumstances, TAF failed to establish that its financial condition is so poor that its very survival is at stake and failed to show the dire economic emergency required to justify its failure to make required payments to the benefit funds and to justify the unilateral reduction in wage rates for new employees. TAF cites no contrary authority and proposes no modified remedy which it submits would be appropriate. Accordingly, I shall order TAF to make whole the benefit funds for all contributions that would have been paid but for TAF's unlawful discontinuance of payments.[3] TAF must make unit employees whole as set forth in *Kraft Plumbing & Heating, 252 NLRB 891 fn. 2 (1980)*, enfd. *661 F.2d 940 (9th Cir. 1981)*, the amounts to be computed in the manner set forth in *Ogle Protection Service, 183 NLRB 682 (1970)*, with interest as computed in *New Horizons for the Retarded, 283 NLRB 1173 (1987)*.

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[3] Because the provisions of employee benefit funds agreements are variable and complex, the Board leaves to the compliance stage the question whether the Respondent must pay any additional amounts into benefit funds in order to satisfy this make-whole remedy. *Merryweather Optical Co., 240 NLRB 1213 (1979)*.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

ORDER

The Respondent, Triple A Fire Protection Inc. (TAF), its officers, agents, and representatives, shall

1. Cease

a. Refusing to bargain with Sprinkler Fitters Local Union 669 as the exclusive bargaining representative of its employees in the unit described below by bypassing the Union and dealing directly with such employees and by unilaterally stopping payments to benefit funds and reducing wage rates for newly hired unit employees at a time when no impasse in bargaining with the Union has occurred.

b. In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

a. On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

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[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, 29 CFR 102.46, the findings. conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, 29 CFR 102.48, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

> All Journeymen Sprinkler Fitters and Apprentices employed by Triple A Fire Protection, Inc. who are engaged in all work as set forth in Article 18 of the national agreement of 1988-1991.

b. If requested by the Union, resume participation in and contributions to the fringe benefit plans to which TAF stopped contributions effective April 22, 1991.

c. If requested by the Union, rescind any or all changes in wage rates or benefits unilaterally implemented effective April 22, 1991.

d. Make whole the unit employees and fringe benefit funds, in the manner set forth in the Remedy portion of the decision.

e. Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

f. Post at its Semmes, Alabama facility copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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[5] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

g. Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated, Washington, D.C. January 19, 1994

Richard J. Linton, Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with Sprinkler Fitters Local Union 669 as the Section 9(a) exclusive bargaining representative of our employees in the unit described below by bypassing the Union and dealing directly with you or by unilaterally stopping payments to benefit funds or by reducing wage rates for newly hired unit employees at a time when no impasse in bargaining with the Union has occurred.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

> All Journeymen Sprinkler Fitters and Apprentices employed by Triple A Fire Protection, Inc. who are engaged in all work as set forth in Article 18 of the national agreement of 1988-1991.

WE WILL, on request by the Union, resume as requested participation in and contributions to the benefit funds to which effective April 22, 1991 we unilaterally stopped contributing to.

WE WILL, on request by the Union, rescind any or all changes in wage rates for new employees which we unilaterally implemented effective April 22, 1991.

WE WILL make whole all employees and the benefit funds, in the manner set forth in the NLRB's decision in this case, for all losses resulting from the unilateral changes we implemented effective April 22, 1991.

APPENDIX C

Triple A Fire Protection, Inc. and United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Road Sprinkler Fitters Local Union No. 669, AFL-CIO

Case 15-CA-11498

NATIONAL LABOR RELATIONS BOARD

312 N.L.R.B. 1088; 1993 NLRB LEXIS 1086;
146 L.R.R.M. 1042; 1993 NLRB Dec. (CCH) 15124;
312 NLRB No. 162

October 19, 1993

ORDER REMANDING

By James M. Stephens, Chairman; Dennis M. Devaney, Member; John Neil Raudabaugh, Member

OPINION:

On March 26, 1993, Administrative Law Judge Richard J. Linton issued the attached decision. The General Counsel, the Charging Party, and the Respondent filed exceptions and supporting briefs. The General Counsel and the Charging Party also filed answering briefs.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to remand the proceeding to the judge for consideration of the complaint allegations in light of our findings set forth below.

The complaint alleges, inter alia, that the Respondent violated Section 8(a)(5) and (1) of the Act by ceasing to make fringe benefit contributions and changing the wage rates of employees provided for in the expired collective-bargaining agreement between the Respondent and the Union. The judge found that the agreement was an 8(f) contract and therefore the Respondent was free to repudiate it on expiration. We disagree with the judge.

The Respondent is an Alabama corporation engaged in the construction industry installing sprinkler systems. For several years, the Union has entered into national collective-bargaining agreements with the National Fire Sprinkler Association, Inc. Since 1983, the Respondent has been party to successive national collective-bargaining agreements, the latest effective from April 1, 1988, through March 31, 1991.

In early October 1987, the Union sent a letter to the Respondent requesting that the Respondent sign a form recognition agreement. The purpose of obtaining the signed form was to "solicit [the Respondent's] cooperation in minimizing any possible disruption to our relationship that might otherwise be caused by the *Deklewa*[1] decision," and to confirm the Union's "status as the current exclusive bargaining representative of your sprinkler fitter employees under the National Labor Relations Act." The Union enclosed a copy of a fringe benefit report form and the recognition form.

The recognition form, signed on October 19, 1987, by the Respondent's president, Alton Turner, reads:

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[1] *John Deklewa & Sons, 282 NLRB 1375 (1975)*, enfd. sub nom. *Iron Workers Local 3 v. NLRB, 843 F.2d 770 (3d Cir. 1988)*, cert. denied *488 U.S. 889 (1988)*.

> ACKNOWLEDGEMENT OF THE REPRESENTATIVE STATUS OF ROAD SPRINKLER FITTERS LOCAL UNION NO. 669, U.A., AFL-CIO
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> The Employer executing this document below has, on the basis of objective and reliable information, confirmed that a clear majority of the sprinkler fitters in its employ have designated, are members of, and are represented by, Road Sprinkler Fitters Local Union No. 669, U.S., AFL-CIO, for purposes of collective bargaining.
>
> The Employer therefore unconditionally acknowledges and confirms that Local 669 is the exclusive bargaining representative of its sprinkler fitter employees pursuant to Section 9(a) of the National Labor Relations Act.

The Union states in its letter that the enclosed fringe benefit form, covering the weeks ending May 30 through June 20, 1987, "confirms that all, or nearly all, of your sprinkler fitter employees are members of and represented by Local 669." The form lists eight names, including Respondent President Alton Turner and his son, a supervisor. Turner testified that before March 1991, the greatest number of workers employed for a given month was seven or eight.

On March 26, 1991, the Respondent informed the Union that, effective on the expiration of the contract on March 31, it would no longer adhere to the extant wage and benefit terms and conditions of employment.

The judge rejected the contention of the General Counsel and the Union that the Union in 1987 attained the status of a 9(a) representative. He found that although the Respondent voluntarily recognized the Union as the exclusive 9(a) representative of its employees and the fringe benefit reports reflected that a majority of the Respondent's sprinkler fitter employees were then members of the Union, the transformation from 8(f) to 9(a) status requires a more "affirmative" showing of majority support "manifested" by unit employees. The judge concluded that the General Counsel and the Union failed to carry their burden of establishing that the Union's 8(f) contractual status with the Respondent matured into a relationship under Section 9(a) of the Act. He therefore dismissed the complaint.

We do not agree with the judge. The record establishes that the Union made an unequivocal demand for recognition as the 9(a) representative of the Respondent's unit employees and proffered to the Respondent documentary evidence which was purported to support the Union's claim of majority status. By executing the acknowledgement, the Respondent voluntarily and unequivocally granted recognition to the Union as 9(a) representative. It is clear that the parties intended to establish a bargaining relationship under Section 9(a) of the Act. See *Golden West Electric, 307 NLRB 1494 (1992).*

Contrary to the approach of the judge and the Respondent,[2] we will not at this late date inquire into the Union's showing of majority status. In *Deklewa,* the Board stated that unions should not have less favored status with respect to construction industry employers than they possess with respect to those outside the construction industry. In nonconstruction industries, if an employer grants Section 9 recognition to a union and more than 6 months elapse, the Board will not entertain a claim that majority status was lacking at the time of recognition. As parties in the construction industry are entitled to no less protection against such late claims, we will not entertain a challenge here, where the Respondent voluntarily recognized the Union as a 9(a) representative in 1987 and waited until 4 years later to object. See *Casale Industries, 311 NLRB No. 92,* slip op. at 3 (May 28, 1993), which issued after the judge's decision in the instant case.[3]

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[2] The Respondent contends that the Union was not a 9(a) representative because the Union did not represent an uncoerced majority of its unit employees, arguing that it had unlawfully assisted the Union in the past and that the Union's acts had coerced a majority into supporting the Union.

Because he dismissed the complaint based on his threshold finding that the agreement between the parties was an 8(f) and not a 9(a) contract, the judge did not address the issue of whether the Respondent may have been privileged to implement changes in wages and fringe benefit contributions because of impasse or other reasons. We shall remand the proceeding for a resolution of the complaint's unilateral change and other allegations in light of our reversal of the judge's 8(f) finding.

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[3] In joining his colleagues in finding that the agreement between the parties was a 9(a) contract, Member Devaney relies on the parties' clear expression of their intent in October 1987 that they were establishing a 9(a) bargaining relationship. See *Comtel Systems Technology, 305 NLRB 287, 291 (1991)* (Member Devaney, dissenting). Member Devaney did not participate in *Casale Industries* and does not rely on the 6-month time limit on construction industry employers' challenges to 9(a) relationships set forth therein. In his view, the basis for applying a 10(b) limitations period in the nonconstruction industry workplace, where minority recognition is unlawful, does not hold in the construction industry, where there is no statutory prohibition on minority recognition.

ORDER

IT IS ORDERED that the proceeding is remanded to the judge for resolution of the complaint allegations in light of our determination above.

IT IS FURTHER ORDERED that the judge shall prepare and serve on the parties a supplemental decision setting forth credibility resolutions, findings of fact, and conclusions of law and recommendations as found necessary consistent with the remand. Copies of the supplemental decision shall be served on all parties after which the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

ALJ: RICHARD J. LINTON

ALJ-DECISION:

CORRECTION

My decision in this case issued on March 26, 1993. In the last line on page 12 of my decision I typed an incorrect volume citation for Comtel Systems Technology. I now correct volume 303 to read 305.

July 12, 1993

DECISION

RICHARD J. LINTON, Administrative Law Judge

Statement of the Case

This construction industry case of unilateral changes and direct dealing involves Sections 8(f) and 9(a) of the Act. Resolution of the legal issues is governed by the principles enunciated by the Board in *John Deklewa & Sons, 282 NLRB 1375 (1987)*. Finding that the Government failed to establish that the Union's 8(f) status with Triple A matured into a 9(a) relationship with the company, I dismiss the complaint.

The main question here is whether a contract, permitted under Section 8(f) of the Act, was transformed in October 1987 into a relationship in which the Union would enjoy the full benefits of Section 9(a) of the Act, *29 USC 159*(a). The answer to that question depends on resolution of a subsidiary issue concerning whether the General Counsel and Local 669 demonstrated that the Union, in October 1987, made a "clear showing" of majority status among Triple A's sprinkler fitter employees.

The subsidiary issue turns on the linchpin question of whether majority status can be demonstrated by the union membership reflected by fringe benefit reports, or whether majority status must be manifested by some overt action of the employees themselves (such as signing authorization cards or answering questions in a poll). Finding that the Board requires the latter, while the Government proved only the former, I dismiss the complaint in its entirety. Allegations of direct dealing fall with the complaint because they depend on 9(a) status, a status Local 669 never achieved.

I presided at this 7-day trial, opening August 25, 1992 and closing December 17, 1992, in Mobile, Alabama pursuant to the September 27, 1991 complaint issued by the General Counsel of the National Labor Relations Board through the Acting Regional Director of Region 15 of the Board. The complaint is based on a charge filed April 4, 1991, and later amended, by the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Road Sprinkler Fitters Local Union No. 669, AFL-CIO (Union, Local 669, or Charging Party) against Triple A Fire Protection, Inc. (Respondent, Company, TAF, or Triple A).

In the complaint, the General Counsel alleges that Respondent TAF violated Section 8(a)(1) and (5) of the Act, *29 USC 158*(a)(1) and (5), when (1) Alton Turner (Turner), Company's president, bypassed the Union and dealt directly with TAF's employees by various acts between about late February 1991 and March 1991, and (2) when Steve Turner, an admitted supervisor of Company, also bypassed Local 669 about March 1991. The complaint also alleges that since about April 20, 1991 Company unilaterally (1) has ceased making fringe benefit payments required by the collective bargaining agreement (CBA) and (2) has changed the wage rates of employees covered by the CBA which expired March 31, 1991.

Aside from admitting some facts, Triple A denies any violation of the Act, alleges that the CBA was an "8(f)" prehire agreement, and asserts three affirmative defenses: (1) the Union has never represented an uncoerced majority of Triple A's employees in an appropriate unit; (2)

since March 1, 1990 [at trial TAF's counsel gives the more likely date of April 1, 1991], the Union has failed to bargain in good faith with Company; and (3) the Union waived any right it may have had to bargain over proposed changes in wage rates and fringe benefits by failing to act with due diligence.

Based on motions, the due date for the filing of posthearing briefs was extended to Monday, March 8, 1993. The parties have filed briefs. The General Counsel and the Union filed their briefs by the due date. Because it was unable to meet the extended deadline, TAF submitted its first 44 pages, which were received on the March 8 due date, explaining that the balance would follow. On Tuesday, March 9, the balance of TAF's 101-page brief (plus attachments) was received. Tables for contents and authorities were received Thursday, March 11. Also received on March 11 was Triple A's unverified motion to file, under 29 CFR 102.111(c), its brief one day late. On Friday, March 12, the Atlanta Judges' office received the March 11 affidavit (required by Rule 102.111c) of TAF's attorney, Willis C. Darby Jr., in support of TAF's motion.

In his affidavit Darby describes his efforts to complete and mail TAF's brief on Saturday, March 6. No description is given for events before March 5. Despite work of 14 hours on Friday and 12 hours on Saturday by Darby and four clerical employees in completing the brief and verifying references, the brief was not ready to deliver to Federal Express by its 5 p.m. closing time on Saturday, March 6. Darby implies that if Federal Express had been available on Sunday, March 7, TAF could have filed its brief on time.

Darby further asserts in his affidavit that before mailing his completed brief he had not received any mail during March from the General Counsel or the Union, and he had not yet claimed two certified envelopes waiting for him. The suggestion is that he did not receive and read their briefs before completing and mailing TAF's. By Thursday, March 11, Darby concludes, the General Counsel had informed him he intended to oppose the late filing, and Union counsel stated he had not decided. Since then the Union has filed its March 12 response in which, taking no position, it defers to the ALJ's "sound discretion." By his written response of March 16, 1993, the General Counsel also takes no position and, like the Union, leaves the matter to the ALJ's discretion.

Under 29 CFR 102.111(c), a brief may be filed late on a showing of good cause based on "excusable neglect" when "no undue prejudice would result." A motion shall be filed stating the grounds relied on. "The specific facts relied on to support the motion shall be set forth in affidavit form and sworn to by individuals with personal knowledge of the facts."

Granting TAF's motion will not result in any undue prejudice. TAF's brief was only one day late (and probably would have been timely if there had been overnight mail pickup service on Sundays), it appears that attorney Darby did not receive and read the briefs of opposing counsel during the interim, and because the slight delay will not result in delay of this decision, I shall grant TAF's motion to file its brief one day late. Because there is no right to file reply briefs before ALJs (and because counsel for the General Counsel and the Union telephonically informed the Atlanta Judges' office that they were not going to seek to file reply briefs), I need not wait for reply briefs under any extension of time contemplated by Rule 102.111(c) for a responding document.

On the entire record,[1] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel (whose brief includes a proposed order and notice), Local 669, and Triple A, I make the following:

Findings of Fact

I. JURISDICTION

An Alabama corporation, Respondent Triple A operates from Semmes (Mobile), Alabama where it is engaged in the nonretail installation of sprinkler systems. During the 12 months ending August 31, 1991, Company purchased and received at its Semmes facility goods and materials valued at $50,000 or more direct from points outside Alabama. Respondent TAF admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION INVOLVED

TAF admits, and I find, that Road Sprinkler Fitters Local Union No. 669 is a labor organization within the meaning of Section 2(5) of the Act, *29 USC 152*(5).

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[1] Unless otherwise indicated, all dates are for 1991. References to the seven-volume transcript of testimony are by volume and page. Exhibits are designated GCX for the General Counsel's, CPX for the Union's, and RX for Respondent TAF's.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

1. Collective bargaining history

Alton Turner began working in the sprinkler fitting industry about 1972 or 1973. (6:1029, 1155). At that time he joined Local 669. (6:1027). Some 10 years later, about 1983, Turner founded his own company to engage in that business, incorporating Triple A about 1983. (1:190; 2:290). Turner, who is president of TAF, holds a 51 percent majority of Company's stock and runs the business. (1:191). Turner's wife, Lovina, owns the balance of the stock and is TAF's secretary and treasurer. (7:1252-1253, 1269). She also serves as Turner's office secretary. (1:198, 215; 7:1253). Turner's son, Steve, is an acknowledged statutory supervisor for TAF. Other family members also work for TAF. (7:1253-1254).

Local 669 is headquartered in Landover, Maryland (2:319) where H. V. Simpson is the Union's business manager. (1:125; 2:319). Ronnie L. Phillips has worked 15 years for Local 669, and is a business agent of the southern district and a regional representative for the Union. His area covers Alabama, Mississippi, and Puerto Rico. Since 1983 Phillips, on behalf of the Union, has dealt with Turner respecting all matters between Local 669 and TAF. (2:299-300; 316; 4:650; 5:819).

The Union's territorial jurisdiction receives different descriptions in the record. (1:34; 2:319; 5:836-838, 855-856, 881). However, articles in the 1988-1991 national CBA (GCX 21; RX 41) for recognition (art. 3) and territory (art. 6) disclose that it covers offshore drilling operations plus

47 states and the District of Columbia, but not Connecticut (Local 676), Florida (Local 821), and the territory covered by Locals in some 18 cities. Rhode Island apparently is covered by the Providence Local. The matter of TAF's desire to be able to do business outside Alabama, particularly in Florida, arose during the negotiations between Local 669 and TAF.

For years Local 669 has entered into national CBAs with the National Fire Sprinkler Association, Inc. (NFSA). A copy is in evidence, for historical purposes only (6:1049), of the CBA for April 1, 1982 through March 31, 1985. (RX 18). In October 1983 Turner, as president of TAF, signed an interim agreement (RX 20) to be bound to the 1982-1985 contract (1:192; 6:1051), and on February 8, 1984 he signed a one-page (RX 22; 7:1288) amendment to the economic package. Turner also signed to be bound to the national CBA of 1985-1988 (GCX 20; GCX 2; 1:193-194).

Triple A, by Turner, also signed (GCX 2; 1:193-194) to be bound to the national CBA of April 1, 1988 through March 31, 1991 (GCX 21; RX 41; 2:301). As we shall see, on March 31, 1991 the 1988-1991 CBA expired as to TAF. On April 9 the Union and TAF began independent negotiations for a CBA, but after a dozen or so meetings, the last one held in July 1992, there still was no agreement for a replacement contract. The 1988-1991 CBA's recognition clause, in article 3, provided:

> *Recognition*: The National Fire Sprinkler Association, Inc. for and on behalf of its contractor members that have given written authorization and all other employing contractors becoming signatory hereto, recognize the Union

> as the sole and exclusive bargaining representative for all Journeymen Sprinkler Fitters and Apprentices in the employ of said Employers, who are engaged in all work as set forth in Article 18 of this Agreement with respect to wages, hours and other conditions of employment pursuant to Section 9(a) of the National Labor Relations Act.

In early October 1987 (1:138), from its national office in Landover, Maryland, Local 669's business manager, H. V. Simpson (1:125), mailed letters (1:127), with enclosures, "To All Independent Contractors," some 400 in number (1:132). A copy of the letter, in evidence (CPX 1), reads:

> As a contractor signatory to the 1985-1988 collective bargaining agreement with Local 669, it can come as no surprise to you that Local 669 is the designated and exclusive bargaining representative of your sprinkler fitter employees, almost all of whom are 669 members.
>
> Earlier this year, the National Labor Relations Board in Washington, D.C. issued a decision in *John Deklewa and Sons, 282 NLRB No. 184 (1987),* which, if it stands on appeal, may throw into question the nature of the relationship between your organization and Local 669. The purpose of this letter is to solicit your cooperation in minimizing any possible disruption to our relationship that might otherwise be caused by the *Deklewa* decision.
>
> Enclosed is a copy [CPX 3; 1:128, 130] of a recent fringe benefit report filed by your organization with the N.A.S.I. Funds. [National Automatic Sprinkler Industry Fringe Benefit Funds.] Upon reviewing it, you will note that it accurately confirms that all, or nearly all, of your

> sprinkler fitter employees are members of and represented by Local 669. Also enclosed is a form recognition agreement [CPX 2; 1:128, 131-132] reflecting that fact and Local 669's status as the exclusive bargaining representative of your sprinkler fitters. Please review the enclosed and return an executed copy of the recognition agreement to this office. The only significance of the agreement is that it confirms Local 669's status as the current exclusive bargaining representative of your sprinkler fitter employees under the National Labor Relations Act.
>
> Because of our concern over the possible and unnecessary disruptive effects of *Deklewa,* we have determined to initiate legal proceedings with the National Labor Relations Board with respect to any contractor who declines to execute and return the enclosed form. We need your response within fourteen (14) days.
>
> Please accept our regrets for any inconvenience caused by this request. The National Labor Relations Board, not Local 669, is the villain of this piece.
>
> Thank you for your cooperation. We look forward to a harmonious and mutually beneficial relationship with your organization for years to come.

The recognition form (CPX 2) enclosed, signed on October 19, 1987 by Turner on behalf of TAF (1:197; 2:291), reads:

> ACKNOWLEDGEMENT OF THE REPRESENTATIVE STATUS OF ROAD SPRINKLER FITTERS LOCAL UNION NO. 669, U.A., AFL-CIO

> The Employer executing this document below has, on the basis of objective and reliable information, confirmed that a clear majority of the sprinkler fitters in its employ have designated, are members of, and are represented by, Road Sprinkler Fitters Local Union No. 669, U.S., AFL-CIO, for purposes of collective bargaining.
>
> The Employer therefore unconditionally acknowledges and confirms that Local 669 is the exclusive bargaining representative of its sprinkler fitter employees pursuant to Section 9(a) of the National Labor Relations Act.

The fringe benefit form (CPX 3) lists eight names, including two Turners (Alton, the president, and his son, Steve, the acknowledged supervisor). Two of the names (W. A. Hudspeth and R. S. Vernon) are shown as having worked no hours during the 4-week covered period for the weeks ending May 30, 1987 through June 20, 1987. The other four individuals listed are: C. W. Aikens, J. R. Moiren, P. A. Thames, and G. J. Andrews. Turner testified that before March 1991 the greatest number of employees he had for a given month was seven or eight. (6:1156). At the hearing the General Counsel introduced similar reports for October and November 1987 (GCXs 4, 5) also reflecting union membership by TAF's sprinkler fitter employees.

In evidence is a copy (GCX 26) of certain Alabama statutes, enacted in 1953, currently in force. Under these statutes, Alabama may be described as a right-to-work state. (3:514-518; 4:653).

2. Events preliminary to 1991-1992 negotiations

By letter dated December 14, 1990 (RX 5), the Union, by Business Manager Simpson, notified "All Independent Local 669 Contractors" of the Union's desire to negotiate a renewal CBA effective April 1, 1991. If a renewal contract were not reached before March 31, Simpson warned, "lawful economic action" could ensue on and after April 1. Simpson enclosed two copies "of our Assent and Interim Agreement" to consider, sign, and return. (2:413) A copy of the type of assent and interim agreement that was enclosed is separately in evidence as RX 14. (3:621-624).

Under the two-page assent and interim agreement form (RX 14) which Simpson mailed to TAF, the Union would agree not to strike to obtain a successor CBA to the one expiring March 31, 1991. The parties would agree, among other provisions, that all terms of the current CBA would remain in effect until the effective date of the successor CBA, with increases in wages and fringes retroactive to April 1, 1991.

Apparently around mid-March 1991 Simpson, Phillips testified (2:415), telephoned Phillips and informed him that Turner had failed to sign and return the Assent and Interim Agreement. On March 18 Phillips telephoned Turner and, Phillips testified, asked if they could meet to discuss negotiations for a renewal contract. Turner said he had business in Atlanta the next day. They set no date to meet. (2:302-303, 337; 3:578). With an important exception, Turner's version of the call is generally consistent with that of Phillips. (6:1086-1087). The main difference is

Turner's assertion that Phillips asked whether Turner was going to sign the interim agreement. (6:1087).

At several points in his testimony Phillips clearly denies that he even mentioned the interim agreement to Turner. (2:373, 413, 417). That was before it was disclosed that Turner had tape-recorded the March 18 telephone conversation. A transcript (RX 11) of that telephone conversation was received in evidence. (3:576, 609). Later, in conjunction with other tape recordings excluded on the basis they pertained to settlement discussions of a related matter (5:780, 790), the Union moved (CPX 8; 4:641; 5:792; 6:942) to strike the transcript, RX 11. The General Counsel joined in that motion. (6:948). The Union so moves on the basis that Board policy excludes from evidence any secret tape recordings of conversations which involve contract negotiations. *Carpenter Sprinkler Corp., 238 NLRB 974, 975 (1978),* enfd. on point *605 F.2d 60, 102 LRRM 2199, 2202 (2d Cir. 1979).* I postponed ruling until this decision. (6:953).

The taped telephone conversation of March 18 focused on the interim agreement and when the parties could meet and discuss contract negotiations. As such topics appear to fall within the rule of Carpenter Sprinkler, I grant the Union's motion, strike Respondent's Exhibit 11, and transfer RX 11 to the Rejected Exhibits File. On the same basis I transfer RX 94 to the Rejected Exhibits File. (7:1297). RX 94 is the transcript of a tape recording which Turner secretly made of his April 3, 1991 telephone conversation with Phillips concerning the beginning of contract negotiations.

Although Phillips testified that he never asked Turner to sign an interim agreement (2:412; 3:577), he clearly asserts that he never mentioned the term (2:373, 413, 417) during the telephone conversation. Later he admits that he did mention it and that when he did so he was referring to RX 14. (3:622).

On March 19, the day following the March 18 telephone conversation, Phillips made a surprise visit to Triple A and found Turner there. (2:303, 337, 416; 6:1088). Turner testified that the Atlanta trip canceled, but concedes he did not notify the Union. (6:1168-1169). Accompanying Phillips was Clarence Radecker (2:304), a business agent from the Union's Arkansas-Louisiana District 6. (7:1339). Phillips testified that he went there to set up contract negotiations. (2:304, 340, 416). Phillips testified that Turner said he had no intention of negotiating a CBA with Local 669. (2:304, 307). (Radecker was not called as a witness until rebuttal and therefore did not address this visit.)

Turner testified that Phillips asked if Turner was going to sign the contract. Turner asked what the contract consisted of. (Jack Moiren and Alan Thames also were present.) It was not yet complete, Phillips advised. Phillips then called Turner aside and asked if Turner would go ahead and sign the (interim) agreement, that he had a copy in his briefcase in his car. (According to Phillips, 2:240, 417, neither he nor Radecker had a copy of the interim agreement with him that day.) "No," Turner responded, explaining that he would not sign a blank check. (6:1088-1090). At about that point Phillips said they had to discuss a contract. Turner said he was preparing a proposed contract to submit to him later. (6:1130-1133).

Two days later, by letter dated March 21 (GCX 22), Phillips wrote Turner. After referencing their March 18 and 19 contacts, Phillips accused Turner of refusing to bargain, expressed puzzlement at that, and suggested a need "to avert a work stoppage on April 1, 1991." Crossing that letter in the mail was Turner's letter of March 21 (GCX 7) transmitting TAF's proposal (GCX 8) for a complete contract. (1:220-222; 6:1157).

In the meantime the Union had been alerting its membership to a possible strike beginning April 1. The Union's March 1991 newsletter (RX 88) did so. Business Manager Simpson, by a Special Strike Notice To All Members (RX 6), dated March 22, advised that effective April 1 "WE ARE STRUCK" against any contractor not named on an attached list of over 200 signatory contractors. Triple A is not one of the 200-plus names. (2:427). Phillips so notified TAF's employees when he met with them shortly before April 1. (2:427; 5:920-921; 6:992-993).

By letter dated March 26 (GCX 9), Turner wrote Phillips that strike replacements would be hired and paid under the terms of TAF's proposed CBA which TAF had mailed to the Union by letter of March 21. Current employees represented by the Union would continue to be paid under the CBA "until further notice." The further notice was expressed in a separate letter (RX 89) of the same date, March 26, in which TAF notified the International Union that TAF "hereby terminates" the CBA "effectively immediately or as soon as permitted by applicable law."

On March 28 (7:1281) Turner, in a two-page memo (CPX 5), summarized the CBA status, discussed union fines and possible options for employees who desire to work, notified TAF's employees that TAF would be open for business on April 1, and would have to operate with, if necessary, new employees.

Before April 1, however, Phillips told TAF's employees there would be no strike and to report to work on April 1. (2:430; 6:993). Phillips did not notify Turner there would be no strike. (2:430). There was no strike or picketing by the Union on April 1 at TAF. (2:309, 318, 429; 6:1012-1013). Turner thought there would be a strike on April 1 (2:293), and he made preparations for a strike. (6:1094). There is no strike allegation in the complaint. TAF's position is that the strike notice bears on TAF's further position that the Union's contract demands caused an impasse. (2:432-434).

On April 3 Turner and Phillips agreed to meet for bargaining, and to hold the first session on April 9. (2:309). On April 4 Turner wrote (GCX 10; RX 98) confirming a CBA meeting for April 9. (1:227; 5:919; 6:1095). Phillips confirmed by his letter of April 5. (GCX 23; 2:310). Turner observed that although TAF had forwarded a complete contract proposal, TAF had not received the Union's counterproposal and would like to have it for review before the April 9 meeting. The next day Phillips, by his letter of April 5 (GCX 23, apparently crossing RX 98 in the mail), confirmed the first meeting date of April 9 for CBA negotiations, stated he had questions concerning

TAF's proposed contract, and asserted that he had some contract proposals of his own which he would present at the meeting.

The parties held their first bargaining session on April 9, 1991 at the Bradbury Inn in Mobile. At this point I pause only to list the dates of the ten or so meetings. I write "or so" because the parties list 13 scheduled meetings even though bargaining occurred only at 9 or 10. For example, the parties refer to one meeting date, May 21, as a meeting. Although the third meeting was scheduled for May 21, TAF's representatives arrived a few minutes late, the Union left (there is a dispute whether the Union's representatives saw TAF's representatives entering the parking lot), and no bargaining occurred until the next day, May 22. Similarly, no bargaining occurred at the eighth meeting on October 8 because Turner, who had broken a tooth the previous evening, left early for an emergency dental appointment. Finally, no bargaining occurred at the 10th meeting on January 14, 1992. There is a dispute over attendance. Accordingly, the actual 10 bargaining sessions are (plus the aborted meetings of May 21, October 8, and January 14 shown in brackets):

1. 4- 9-91
2. 4-30-91
3. [5-21-91]
4. 5-22-91
5. 6-25-91
6. 6-26-91
7. 8-28-91
8. [10- 8-91]
9. 11-25-91
10. [1-14-92]
11. 2-18-92
12. 3-17-92
13. 7-16-92

On April 10 the Union, by Business Manager Simpson, sent a two-page special notice (RX 104) to all members informing them that agreement had been reached for a renewal 3-year national CBA, wages retroactive to April 1 within 30 days of ratification. Phillips concedes that he never delivered a copy of the new (1991-1994) CBA to TAF. (3:618, 621). Although no copy of the national 1991-1994 CBA is in evidence, Simpson's April 10 announcement (RX 104) summarizes the highlights, including the increased wages and benefits, of that new contract. Following the final (and abbreviated) meeting on July 16, 1992, the Union wrote (RX 224) that it was willing to continue negotiations. TAF did not respond, and no further meetings have been held.

B. The Union's Lack of 9(a) Status

This case arises in the construction industry, and the case is controlled by the principles enunciated in *John Deklewa & Sons, 282 NLRB 1375 (1975).* One of those principles is this: "In light of the legislative history and the traditional prevailing practice in the construction industry, we will require the party asserting the existence of a 9(a) relationship to prove it." *Deklewa* at 1385, fn. 41. The General Counsel and Local 669 assert that they carried this burden by virtue of the earlier cited assents, acknowledgments, confirmations, and fringe benefit reports showing majority status by virtue of union membership in Alabama, a right-to-work state.

In determining whether the Union's 8(f) status with TAF was transformed into a 9(a) relationship, the focus is on October 19, 1987 when Alton Turner, TAF's president, signed the Acknowledgment of Representative Status (CPX 2). Recall that in such acknowledgment Turner declares that a "clear majority" of TAF's sprinkler fitters are members of Local 669 and have designated the Union as their collective bargaining representative. Turner then "unconditionally acknowledges and confirms that Local 669 is the exclusive bargaining representative of its sprinkler fitter employees pursuant to Section 9(a) of the National Labor Relations Act." When Turner signed TAF's assent to the 1988-1991 CBA, he recognized, as I quoted earlier, the Union as the exclusive bargaining representative for TAF's sprinkler fitter employees "pursuant to Section 9(a) of the National Labor Relations Act." The fringe benefit reports (CPX 3; GCXs 4, 5) apparently reflect that a majority, perhaps all, of TAF's sprinkler fitter employees were then members of Local 669.

The question is, did these acknowledgments, confirmations, and recognitions by Turner/TAF, plus the 1987 fringe benefit reports showing that a majority of TAF's sprinkler fitter employees were members of Local 669, achieve the Union's goal of transforming itself from an 8(f) limited representative to a 9(a) full representative of TAF's sprinkler fitter employees. The test for determining transformation from 8(f) to 9(a) status is set forth by the Board in *Deklewa, 282 NLRB at 1387, fn. 53* (emphasis added):

> We do not mean to suggest that the normal presumptions would not flow from voluntary recognition accorded to a union by the employer of a stable work force where that recognition is based on a clear showing of majority support among the unit employees, e.g., a valid card

majority. *Island Construction Co., 135 NLRB 13 (1962).* That is, nothing in this opinion is meant to suggest that unions have less favored status with respect to construction industry employers than they possess with respect to those outside the construction industry.

Copies of these acknowledgments are present in the recent case of *Excel Fire Protection Co., 308 NLRB No. 44* (Aug. 14, 1992). (The case involves the same Local 669.) The employer there confirmed, among other acknowledgments, that all of its sprinkler fitters were members of Local 669. The Board adopted ALJ Pannier's finding of 9(a) status. As Judge Pannier observes, however, the employer respondent in Excel raised no issue about the majority status on which the acknowledgments and CBA were based. *Excel, 308 NLRB No. 44* JD slip op. at 3. Because no question was raised in Excel about majority status, it is questionable whether Excel resolves the issue here where TAF, unlike the passive position of the employer there, disputes the Government's contention that the evidence shows majority status.

Does a showing of majority status by virtue of union membership, as exists here (based on the 1987 fringe benefit reports), satisfy Deklewa's requirement of a "clear showing"? In fact, the Board in *Deklewa,* at a point earlier than footnote 53, quotes the statement that union membership "is not always an accurate barometer of union support." *Deklewa* at 1383-1384. And fringe benefit reports are described there as demonstrating only "some degree of compliance with a benefit provision in the agreement." *Id.* at 1384. The one example the Board gave in footnote 53 for a "clear showing" is a showing by "a valid card majority." In short, the Board cited an affirmative expression by the employees themselves.

Language in subsequent cases repeat the need for the showing to be "affirmative." *Brannan Sand & Gravel Co., 289 NLRB 977, 979 (1988).* Support must be "manifested" by the employees. *Comtel Systems Technology, 303 NLRB No. 30* slip op. at 8 (Sept. 30, 1991). Dissenting in Comtel, Member Devaney wrote, "if it is clear the parties understood they were entering into a 9(a) relationship, I would find a valid 9(a) relationship." Comtel, dissent, slip op. at 17. At footnote 5 of his dissent, Member Devaney wrote that majority status may be shown, among other methods, by the union's assertion that it represents a majority. It appears that Member Devaney's dissenting position in Comtel would find 9(a) status here.

Nevertheless, the Board has held that union membership, even in a right-to-work state, does not satisfy the *Deklewa* requirement for a "clear showing." *J & R Tile, 291 NLRB 1034, 1037 (1988).* Thus, in the absence of a showing by valid card majority, a valid poll, or other objective method by which a majority of TAF's employees manifested their designation of the Union as their collective bargaining representative, I find that the General Counsel and the Union failed to carry their burden of establishing that Local 669's 8(f) contractual status with TAF ever matured into a relationship under Section 9(a) of the Act, *29 USC 159*(a). In short, the 1988-1991 national CBA, to which TAF was bound, was an 8(f) prehire contract as to Triple A.

C. Complaint Dismissed

1. Unilateral changes

Under *Deklewa,* a union signatory to an 8(f) prehire contract has only the limited 9(a) right to enforce the 8(f) agreement under *29 USC 158*(a)(5). *Deklewa* at 1387; *R & R Brickwork, 299 NLRB 542 (1990).* When an 8(f) contract expires, either party may repudiate so that there is no renewal or extension. *Deklewa* at 1387, 1388. When TAF, by letter of March 26, 1991 (RX 89), terminated the 1988-1991 CBA effective with the contract's March 31, 1991 expiration, TAF escaped its contractual and statutory relationship with Local 669. Accordingly, I shall dismiss the complaint paragraphs which allege that since about April 20, 1991 TAF (a) unilaterally ceased making fringe benefit payments required by the expired CBA (complaint paragraph 12), and (2) since about April 20 TAF has changed wage rates of unit employees (paragraph 13). Because the 8(f) contract had expired, and because the evidence fails to show that TAF at any time became the full 9(a) representative, beginning on April 1, 1991 Triple A had no obligation to continue honoring provisions of the expired 1988-1991 CBA or terms and conditions of employment which existed under that contract. In short, on and after April 1, 1991 TAF, under the Act, was free to do as it pleased respecting terms and conditions of employment.

In view of these findings, the matter of the negotiations and TAF's affirmative defenses, such as impasse, are rendered moot.

2. Direct dealing

a. Introduction

Turning now to the balance of the complaint's paragraphs, the direct dealing allegations, I note that TAF does not address them in its posthearing brief. No party discusses them in light of a possible finding of no 9(a) relationship. That is, even assuming that I credit (and I do) the Government's evidence on the direct dealing allegations, can there be a direct dealing violation in the absence of a full 9(a) relationship? I find the answer to be no because the only rights and privileges Local 669 enjoyed under the 8(f) contract was the right to enforce the contract, under Section 8(a)(5), during the contract's term.

Although the complaint phrases the direct dealing allegations as 8(a)(1) and (5), as if they include allegations of independent coercion, such is not the case for two reasons. First, had the General Counsel intended to allege coercion, the complaint no doubt would have included (it does not) a conclusory allegation of coercion under Section 8(a)(1) of the Act. NLRB Pleadings Manual Sec. 901.1 at 250 (1991). Second, violations of Section 8(a)(5) derivatively violate Section 8(a)(1) of the Act, *Harris Painting, 286 NLRB 642 (1987)*, as in 8(a)(5) and (1). In other words, the direct dealing incidents are not also alleged as coercion. Thus, with the incidents not resulting in 8(a)(5) violations, there necessarily is no derivative 8(a)(1) allegation. Accordingly, I shall dismiss the complaint in its entirety.

However, before dismissing the complaint, and from an abundance of caution on the matter, I shall make findings respecting the direct dealing allegations. Moreover, as the status of foremen as employees or supervisors is relevant both to the direct dealing allegations and to the issue of majority status, I shall include findings on that topic as well.

b. Alton Turner

(1) Introduction

Witnesses who are either employees or former employees of Company describe the following conversations. In his own testimony, Turner does not address these conversations. Aside from its argument that the foremen are supervisors (and therefore no violation in the conversations), TAF argues that even if the Government's witnesses are credited, Turner's comments are not violative of the Act. I credit the Government's witnesses and I would find the direct dealing violations if I were not dismissing the complaint.

(2) Complaint paragraphs 10(a) and (b)

Danny Carpenter worked for Company from February 1988 to September 1991. (1:172, 184). He became a journeyman fitter in January 1991. (1:173). He and Turner were social friends, sipping beer on a few occasions. (1:188-189). About late February 1993 to early March, Carpenter testified, as employees Carpenter, Jack Moiren, and Alan Thames were standing at the shop's doorway with Turner, Turner told the three employees that he might not sign the union contract and that he would guarantee each a foreman's job, pay their insurance, and provide them a truck.

About mid-March 1991, as Turner was visiting at Carpenter's house, Carpenter testified, Turner said he probably was not going to sign the upcoming union contract. Asking Carpenter to stay with TAF, Turner said he would raise Carpenter's pay to a foreman's rate. (1:174-175, 184-186).

(3) Complaint paragraph 10(c)

Jack Moiren worked at Company for about 6 years, from 1985 to September 1991. (1:65, 76, 83). For his last several years at Triple A, Moiren worked as a foreman. (1:65, 116). Moiren has been a member of the Union for about 20 years. (1:65).

About early March at the shop, Moiren testified, Turner asked whether Moiren would stay with him if Turner went nonunion. Turner said that if Moiren stayed his pay would remain at the union rate, he would receive raises when union pay rates increased, would get to keep the company truck he was driving, with gas paid, that he would be provided insurance, and something would be worked out for retirement. (1:66-67, 99-100).

(4) Complaint paragraph 10(d)

Cecil P. "Shorty" Davidson has worked three different times for Company, the first from October 1985 to about October 1986, again from September 1987 to November 1987, and finally from September 1989 to August 1991. (1:40). Davidson became foreman about February 1990 (1:151), and was such in March 1991. (1:151).

About early to mid-March 1991, Davidson testified, he, Jack Moiren, Danny Carpenter, and the Turners

(Alton, president and father, Steve, supervisor and son) had a lengthy conversation on the front porch of Company's office. At one point the conversation turned to the pros and cons of working union and nonunion. Toward the end of the topic, Turner told Davidson that Davidson had a job there no matter what happened, and that Davidson could have insurance by paying one half the premium. At that time Davidson paid no part of the cost of the insurance which Company provided. (1:140-142, 151-152).

c. Steve Turner

Complaint paragraph 11 alleges that about March 1991 TAF, acting through Supervisor Steve Turner, promised employees insurance and higher wages if they remained with TAF in the event TAF did not sign another contract with the Union, and impliedly promised that TAF would institute a profit sharing plan in such circumstances. Phillip Alan Thames testified in support of these allegations.

Phillip Alan Thames has worked for TAF about 7 years, although he left it in August 1991 and returned about June 1992. (1:41-41, 47, 52). Thames works for Company as an apprentice fitter. (1:42). Thames describes a late March conversation in Supervisor Steve Turner's vehicle as they drove back to the shop from a job at a local bank. Turner, Thames testified, said that if Company did not sign a union contract that Thames would still have a job at $14 an hour and still have insurance. Moreover, Turner added that Company would institute either a pension or profit sharing plan. (1:44-45). Steve Turner did not testify.

d. Job foremen not statutory supervisors

(1) Introduction

Although the recognized bargaining unit under the CBA does not specify foremen (GCX 21 at 4), the CBA provides (art. 9) that foremen will be selected by the employer from its journeymen and will be paid $1.25 per hour more than the journeyman's rate. Under Article 9 of the CBA the employer must assign a foreman for each job. Selection of a foreman is the employer's province. (GCX 21 at 12). TAF contends that during the relevant time the unit included two foremen who were statutory supervisors. (1:178). Apparently the two were Jack Moiren and Cecil P. Davidson.

(2) Applicable law

In assessing the facts on this issue, I am guided by the applicable law as summarized in *Adco Electric, 307 NLRB No. 171,* slip op. at 2 fn.3, and JD slip op. at 17-19 (June 30, 1992). The first important Adco point I shall emphasize here is that the party asserting supervisor status has the burden of persuasion on the issue. *Id.* slip op. at 2 fn. 3 and JD slip op. at 17.

The second point from the Adco summary which I highlight here is, "Exercise of the authority which derives from a worker's status as a skilled craftsman does not confer supervisory status because that authority is not the type contemplated in the statutory definition." *Id.,* JD slip op. at 18-19. The third point from the summary is that the powers enumerated at *29 USC 152*(11) are termed the "primary" indicia of supervisory status. When the issue of supervisory status presents a borderline question, "secondary" indicia may be considered. Nevertheless, "secondary" indicia alone will not confer supervisory status under the Act. Adco, JD slip op. at 19. Even the "primary" powers must be linked to the use of or need to exercise independent judgment. Adco, JD slip op. at 18.

Finally, "In these cases the Board has a duty to be alert not to construe supervisory status too broadly because the employee who is deemed a supervisor loses his protected right to organize, a right Congress intended to protect by the Act." Adco, JD slip op. at 19 (citations omitted).

(3) Facts

Evidence on the supervisor question is quite limited, with Turner never addressing the matter when he testified. The bulk of the evidence comes from the testimony of Jack Moiren and Cecil P. Davidson, job foremen during the relevant time.

Most of the time the job foremen served as part of three-man crews, the number including themselves. As job foreman Langford in Adco, JD slip op. at 27, the job foremen here spend about 90 percent of their time working with the tools and the other 10 percent on paperwork and training their apprentices/helpers. They do not independently hire workers. Instead, the instances in which they successfully recommended that someone, usually a relative, be hired, constitute nothing more than the recommendations of skilled craftsmen referring and recommending others from a pool of qualified craftsmen. That is not indicative of statutory authority. Adco, JD slip op. at 18-19, 27. The testimony by Phillip Alan Thames that he was hired by his foreman uncle, Ronnie Pugh (6:955-956, 964), does not establish that Pugh independently hired Thames. The evidence supports the equal inference that Pugh, as a skilled craftsman, simply recommended Thames and Turner authorized Pugh to hire Thames. In the circumstances here, that action does not indicate statutory authority.

Hours and overtime are matters preset by TAF. Although neither Turner would visit some of the jobs outside Mobile, their absence merely reflects the experience level of the job foremen as skilled craftsmen.

Transfers to and from the crews come at the direction of the Turners, generally after discussion with the foremen about the progress of the job. When a larger crew is downsized to fit reduced job needs, any selection of crew members by the job foremen for release back to the office for reassignment is the function of the foremen in their capacity as skilled craftsmen matching crew skills with job needs. The foremen do not resolve grievances. No evidence of disciplinary action by the foremen, exercising independent judgment, was adduced.

(4) Conclusions

TAF has failed to show that the job foremen, and particularly Jack Moiren or Cecil Davidson, possessed any of the primary indicia of a statutory supervisor, or that they exercised any of those powers with independent judgment. As TAF has failed to carry its burden of demonstrating statutory supervisor status on the part of the job foremen, including Jack Moiren and Cecil Davidson, I find that at all relevant times Triple A's job foremen were statutory employees.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

The complaint is dismissed.

March 26, 1993

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[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

APPENDIX D

NATIONAL LABOR RELATIONS BOARD,
Petitioner, v. TRIPLE A FIRE PROTECTION, INC.,
Respondent, Road Sprinkler Fitters Local
Union 669, AFL-CIO, Intervenor.

96-6944

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

149 F.3d 1197; 1998 U.S. App. LEXIS 20765

July 1, 1998, Decided

Citation of Panel Decision: *N.L.R.B., 136 F.3d 727.*

OPINION: Suggestion for Rehearing En Banc Denied.

APPENDIX E

STATUTES INVOLVED

Administrative Procedure Act

5 U.S.C. § 706. Scope of Review. To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall –

* * *

(2) hold unlawful and set aside agency action, findings, and conclusions found to be –

(A) artibrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

* * *

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

* * *

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute

* * *

(Pub. L. 90-554, Sept. 6, 1966, 80 Stat. 393.)

National Labor Relations Act

29 U.S.C. § 157. Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title. (July 5, 1935, ch. 372, Sec. 7, 49 Stat. 452; June 23, 1947, ch. 120, title I, Sec. 101, 61 Stat. 140.)

29 U.S.C. § 158. Unfair labor practices.

(a) Unfair labor practices by employer. It shall be an unfair labor practice for an employer –

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

(b) Unfair labor practices by labor organization. It shall be an unfair labor practice for a labor organization or its agents –

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * *

(f) Agreement covering employees in the building and construction industry. It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a) of this section as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: Provided, That nothing in this subsection shall set aside the final proviso to subsection (a)(3) of this section: Provided further, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 159(c) or 159(e) of this title.

* * *

(July 5, 1935, ch. 372, Sec. 8, 49 Stat. 452; June 23, 1947, ch. 120, title I, Sec. 101, 61 Stat. 140; Oct. 22, 1951, ch. 534, Sec. (b), 65 Stat. 601; Sept. 14, 1959, Pub. L. 86-257, title II, Sec. 201(e), title VII, Sec. 704(a)-(c), 705(a), 73 Stat. 525, 542-545; July 26, 1974, Pub. L. 93-360, Sec. 1(c)-(e), 88 Stat. 395, 396.)

29 U.S.C. § 159 Representatives and Elections.

(a) Exclusive representatives; employees' adjustment of grievances directly with employer. Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment.

(b) Determination of bargaining unit by Board. The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof. . . . (July 5, 1935, ch. 372, Sec. 9, 49 Stat. 453; June 23, 1947, ch. 120, title I, Sec. 101, 61 Stat. 143; Oct. 22, 1951, ch. 534, Sec. 1(c), (d), 65 Stat. 601; Sept. 14, 1959, Pub. L. 86-257, title II, Sec. 201(d), title VII, Sec. 702, 73 Stat. 525, 542.)

29 U.S.C. § 160(b). Complaint and notice of hearings; six-month limitation; answer; court rules of evidence inapplicable. Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before, a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint. Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge.

(July 5, 1935, ch. 372, Sec. 10, 49 Stat. 453; June 23, 1947, ch. 120, title I, Sec. 101, 61 Stat. 146; June 25, 1948, ch. 646, Sec. 32(a), (b), 62 Stat. 991; May 24, 1949, ch. 139, Sec. 127, 63 Stat. 107; Aug. 28, 1958, Pub. L. 85-791, Sec. 13, 72 Stat. 945; Sept. 14, 1959, Pub. L. 86-257, title VII, Sec. 704(d), 706, 73 Stat. 544, Mar. 27, 1978, Pub. L. 95-251, Sec. 3, 92 Stat. 184; Nov. 8, 1984, Pub. L. 98-620, title IV, Sec. 402(31), 98 Stat. 3360.)

APPENDIX F
EXCERPTS FROM AGREEMENT BETWEEN NATIONAL AUTOMATIC SPRINKLER & FIRE CONTROL ASSOCIATION, INC. AND ROAD SPRINKLER FITTERS LOCAL UNION NO. 669, U.A.
APRIL 1, 1982
RESPONDENT'S EXHIBIT 18
ARTICLE 4

Union Security: All present employees covered by this Agreement who are members of Local Union 669 shall, as a condition of employment, maintain their membership in the Union (to the extent and in the manner provided for and permitted by State and Federal Laws). All other employees covered by this Agreement shall, as a condition of employment (to the extent and in the manner provided for and permitted by State and Federal Laws) become members of Local Union 669 seven (7) days following April 16, 1982. All new employees shall, as a condition of employment, become members of Local Union 669 at the end of seven (7) days employment (to the extent and in the manner as provided for and permitted by State and Federal Laws).

A person not a member of the United Association shall be acceptable for employment as a journeyman only after he has produced for the Employer sworn affidavits of four (4) years' experience in the Sprinkler Industry as a helper, apprentice and/or journeyman on the letterhead of his previous employer or employers, and such affidavits have been forwarded to the Union. The four (4) year period conforms to the period of Apprentice training as set forth in the Apprentice Standards of the Sprinkler Industry.

A person not a member of the United Association shall be acceptable for employment as an apprentice after he has met the requirements in the Apprentice Standards, been accepted by the Joint Apprenticeship and Training Committee and issued a probationary apprentice classification card by the Director of Apprenticeship of Local 669. If the Union is unable to furnish men to the Employer, and the Employer employs men not members of the United Association, these employees shall be paid the journeyman's rate provided in the Agreement and contributions shall be made on such employees to the various fringe benefit funds as provided in this Agreement.

Dues Check-Off: The Employer agrees to deduct Union Membership Dues lawfully and uniformly levied by the Union in accordance with the Constitution and By-Laws of the Union from the pay of each employee who executes or has executed the following "Authorization for Check-Off of Work Assessment" form. An "Authorization for Check-Off of Work Assessment" form furnished by the Local Union, shall be given by the Employer to each new employee performing work under this Agreement, for the employee's consideration. Such deductions shall be computed and deducted weekly and remitted to Local Union 669 monthly, not later than the 15th day of each month following the month in which the wages were paid.

* * *

ARTICLE 5

Hiring of Men: Should the Employer fail to secure unemployed 669 Sprinkler Fitter Journeymen or Apprentices from any source available to him, he shall contact the Union requesting a referral of qualified unemployed Sprinkler Fitter Journeymen or Apprentices residing within 100 miles of the job site. The Union shall be given seventy-two (72) hours from time of notification to refer qualified unemployed Sprinkler Fitter Journeymen or Apprentices to perform the work involved.

If the Union fails for any reason to refer unemployed qualified Sprinkler Fitter Journeymen or Apprentices within seventy-two (72) hours, the Employer may hire new apprentices in accordance with the ratios established in this Agreement and subject to applicable Apprentice selection procedures.

* * *

(R18-6)

ARTICLE 16

All Apprentices indentured on and after April 1, 1982 shall be paid a progressive increasing rate of wage based upon the following schedule:

	Percentage of Journeyman's Rate
Class 1	45%
Class 2	50%
Class 3	55%
Class 4	60%
Class 5	65%
Class 6	70%

Class 7	75%
Class 8	80%

(R18-16)

APPRENTICESHIP STANDARDS

Probationary Period

The first three (3) months of employment after the signing of the Apprenticeship Agreement shall be the probationary period. The Apprenticeship Agreement may be terminated during the probationary period or extended probationary period, if one is imposed, by either party without stated cause.

Before the end of the probationary period, the Joint Apprenticeship and Training Committee shall make a thorough review of the Apprentice's ability, attitude and development. Any Apprentice found to be unsatisfactory shall be retained on probation an additional sixty (60) days and reevaluated. An Apprentice found to be inadequate on reevaluation shall be dropped from the Program. An Apprentice who satisfactorily completes the probationary period will be considered a regular Apprentice, initiated into Local Union No. 669 and enrolled in the Related Training Program.

(R18-31)

Responsibilities of Apprentices

The Apprentice shall . . . [r]espect the property of the contractor and abide by the working rules and regulations of the contractor, the local union, and the JATC (Joint Apprenticeship and Training Committee).

(R18-32)

APPENDIX G
EXCERPTS FROM AGREEMENT BETWEEN NATIONAL FIRE SPRINKLER ASSOCIATION, INC. AND ROAD SPRINKLER FITTERS LOCAL UNION NO. 669, U.A.
APRIL 1, 1985
GENERAL COUNSEL EXHIBIT 20

ARTICLE 4

Union Security: All present employees covered by this Agreement who are members of Local Union 669 shall, as a condition of employment, maintain their membership in the Union (to the extent and in the manner provided for and permitted by State and Federal Laws). All other employees covered by this Agreement shall, as a condition of employment (to the extent and in the manner provided for and permitted by State and Federal Laws) become members of Local Union 669 seven (7) days following April 1, 1985. All new employees shall, as a condition of employment, become members of Local Union 669 at the end of seven (7) days employment (to the extent and in the manner as provided for and permitted by State and Federal Laws).

A person not a member of the United Association shall be acceptable for employment as a Journeyman only after he has produced for the Employer sworn affidavits of six (6) years' experience in the Sprinkler Industry as a Helper, Apprentice and/or Journeyman on the letterhead of his previous Employer or Employers, and such affidavits have been forwarded to the Union. The six (6) year period conforms to the period of Apprentice and Preapprentice training as set forth in the Apprentice Standards of the Sprinkler Industry.

A person not a member of the United Association shall be acceptable for employment as an Apprentice or Pre-apprentice after he has met the requirements in the Apprentice Standards, been accepted by the Joint Apprenticeship and Training Committee and issued a probationary Apprentice or Pre-apprentice classification card by the Director of Apprenticeship of Local 669. If the Union is unable to furnish men to the Employer, and the Employer employs men not members of the United Association, these employees shall be paid the Journeyman's rate provided in the Agreement and contributions shall be made on such employees to the various fringe benefit funds as provided in this Agreement.

Dues Check-Off: The Employer agrees to deduct Union Membership Dues lawfully and uniformly levied by the Union in accordance with the Constitution and By-Laws of the Union from the pay of each employee who executes or has executed the following "Authorization for Check-Off of Work Assessment" form. An "Authorization for Check-Off of Work Assessment" form furnished by the Local Union, shall be given by the Employer to each new employee performing work under this Agreement, for the employee's consideration. Such deductions shall be computed and deducted weekly and remitted to Local Union 669 monthly, not later than the 15th day of each month following the month in which the wages were paid.

* * *

ARTICLE 5

Hiring of Men: Should the Employer fail to secure unemployed 669 Sprinkler Fitter Journeymen or Apprentices or Pre-apprentices from any source available to him, he shall contact the Union requesting a referral of qualified unemployed Sprinkler Fitter Journeymen or Apprentices or Pre-apprentices residing within one-hundred (100) miles of the job site. The Union shall be given seventy-two (72) hours from time of notification to refer qualified unemployed Sprinkler Fitter Journeymen or Apprentices or Pre-apprentices to perform the work involved.

If the Union fails for any reason to refer unemployed qualified Sprinkler Fitter Journeymen or Apprentices or Pre-apprentices within seventy-two (72) hours, the Employer may hire new Apprentices in accordance with the ratios established in this Agreement and subject to applicable Apprentice selection procedures.

* * *

(GC20-6)

ARTICLE 12

All Pre-apprentices hired and Apprentices indentured on and after April 1, 1985 shall be paid a progressive increasing rate of wage based upon the following schedule:

Pre-apprentice Class	Percentage Scale
Class 1	30%
Class 2	35%
Class 3	40%
Class 4	45%

Apprentice Class	Percentage Scale
Class 1	50%
Class 2	55%
Class 3	60%
Class 4	65%
Class 5	70%
Class 6	75%
Class 7	80%
Class 8	85%

(GC20-15)

APPRENTICESHIP STANDARDS

Probationary Period

The first six (6) months of employment after the signing of the Apprenticeship Agreement shall be the probationary period. The Apprenticeship Agreement may be terminated during the probationary period or extended probationary period, if one is imposed, by either party without stated cause.

Before the end of the probationary period, the Joint Apprenticeship and Training Committee shall make a thorough review of the Apprentice's ability, attitude and development. Any Apprentice found to be unsatisfactory shall be retained on probation an additional sixty (60) days and re-evaluated. An Apprentice found to be inadequate on re-evaluation shall be dropped from the Program. An Apprentice who satisfactorily completes the probationary period will be considered Grade I Apprentice, initiated into Local Union No. 669 and enrolled in the Related Training Program.

(GC20-31)

Responsibilities of Apprentices

The Apprentice shall . . . [r]espect the property of the Contractor and abide by the working rules and regulations of the Contractor, the Local union, and the JATC (Joint Apprenticeship and Training Committee).

(GC20-33)

APPENDIX H
EXCERPTS FROM AGREEMENT BETWEEN NATIONAL FIRE SPRINKLER ASSOCIATION, INC. AND ROAD SPRINKLER FITTERS LOCAL UNION NO. 669, U.A.
APRIL 1, 1988
RESPONDENT'S EXHIBIT 41

ARTICLE 4

Union Security: All present employees covered by this Agreement who are members of Local Union 669 shall, as a condition of employment, maintain their membership in the Union (to the extent and in the manner provided for and permitted by State and Federal Laws). All other employees covered by this Agreement shall, as a condition of employment (to the extent and in the manner provided for and permitted by State and Federal Laws) become members of Local Union 669 seven (7) days following April 1, 1988. All new employees shall, as a condition of employment, become members of Local Union 669 at the end of seven (7) days employment (to the extent and in the manner as provided for and permitted by State and Federal Laws).

A person not a member of the United Association shall be acceptable for employment as a Journeyman only after he has produced for the Employer sworn affidavits of six (6) years' experience in the Sprinkler Industry as a Helper, Apprentice and/or Journeyman on the letterhead of his previous Employer or Employers, and such affidavits have been forwarded to the Union. The six (6) year period conforms to the period of Apprentice training as set forth in the Apprentice Standards of the Sprinkler Industry.

A person not a member of the United Association shall be acceptable for employment as an Apprentice after he has met the requirements in the Apprentice Standards, been accepted by the Joint Apprenticeship and Training Committee and issued a probationary Apprentice classification card by the Director of Apprenticeship of Local 669. If the Union is unable to furnish men to the Employer, and the Employer employs men not members of the United Association, these employees shall be paid the Journeyman's rate provided in the Agreement and contributions shall be made on such employees to the various fringe benefit funds as provided in this Agreement.

Dues Check-Off: The Employer agrees to deduct Union Membership Dues lawfully and uniformly levied by the Union in accordance with the Constitution and By-Laws of the Union from the pay of each employee who executes or has executed the following "Authorization for Check-Off of Work Assessment" form. An "Authorization for Check-Off of Work Assessment" form furnished by the Local Union, shall be given by the Employer to each new employee performing work under this Agreement, for the employee's consideration. Such deductions shall be computed and deducted weekly and remitted to Local Union 669 monthly, not later than the 15th day of each month following the month in which the wages were paid.

* * *

ARTICLE 5

Hiring of Men: Should the Employer fail to secure unemployed 669 Sprinkler Fitter Journeymen or Apprentices from any source available to him, he shall contact the Union requesting a referral of qualified unemployed Sprinkler Fitter Journeymen or Apprentices residing within one-hundred (100) miles of the job site. The Union shall be given seventy-two (72) hours from time of notification to refer qualified unemployed Sprinkler Fitter Journeymen or Apprentices to perform the work involved.

If the Union fails for any reason to refer unemployed qualified Sprinkler Fitter Journeymen or Apprentices within seventy-two (72) hours, the Employer may hire new Apprentices in accordance with the ratios established in this Agreement and subject to applicable Apprentice selection procedures.

* * *

(R41-6,7)

ARTICLE 16

All Apprentices indentured or reindentured on or after April 1, 1988 will be paid according to the following schedule with increases occurring every (6) months:

Grade 1 Apprentices	Percentage Scale of Journeyman's Rate
Class 1	35%
Class 2	39%
Class 3	43%
Class 4	47%

Class 2 Apprentices	Percentage Scale of Journeyman's Rate
Class 1	50%
Class 2	55%
Class 3	60%
Class 4	65%
Class 5	70%
Class 6	75%
Class 7	80%
Class 8	85%

(R41-17)

APPRENTICESHIP STANDARDS

Probationary Period

The first six (6) months of employment after the signing of the Apprenticeship Agreement shall be the probationary period. The Apprenticeship Agreement may be terminated during the probationary period or extended probationary period, if one is imposed, by either party without stated cause.

Before the end of the probationary period, the Joint Apprenticeship and Training Committee shall make a thorough review of the Apprentice's ability, attitude and development. Any Apprentice found to be unsatisfactory shall be retained on probation an additional sixty (60) days and re-evaluated. An Apprentice found to be inadequate on re-evaluation shall be dropped from the Program. An Apprentice who satisfactorily completes the probationary period will be considered Grade I

Apprentice, initiated into Local Union No. 669 and enrolled in the Related Training Program.

(R41-36)

Responsibilities of Apprentices

The Apprentice shall . . . [r]espect the property of the Contractor and abide by the working rules and regulations of the Contractor, the Local Union, and the JATC (Joint Apprenticeship and Training Committee).

(R41-38)

APPENDIX I

LETTER DATED MARCH 16, 1987 TO TRIPLE A FIRE PROTECTION, INC. FROM JOHN J. WALSH, DIRECTOR OF APPRENTICESHIP OF LOCAL 669 WITH CERTIFIED COPY TO APPLICANT GORDON W. FOWLER

RESPONDENT'S EXHIBIT 31

Local 669 Joint Apprenticeship and
Training Committee
7676 NEW HAMPSHIRE AVENUE
• LANGLEY PARK MARYLAND 20783 •
SUITE 2006
Telephone: 301-431-3500 Toll Free: 800-638-0592

March 16, 1987
CERTIFIED

JOHN J. WALSH
Director

Triple A Fire Protection
Route #1, Box 65
Semmes, AL. 36575

RE: Gordon W. Fowler
SS# 587 34 9261

Gentlemen:

All applicants for entry into the Local 669 Joint Apprenticeship Program are subject to the Approval of the Chairman, Mr. Richards of Local 669 and Committee Secretary, Mr. Cahill of the National Fire Sprinkler Association.

The application submitted for the above-named applicant has been rejected as indicated below. Documents submitted by your concern for this applicant are being retained and you may at any time request that the application be reconsidered. To avoid needless confusion and delays, advise us when making such a request that documents had previously been submitted.

Very truly yours,
/s/ John J. Walsh
John J. Walsh
Director of Apprenticeship
of Local 669

Rejected by: Chairman XX Secretary ______

Reason for rejection:

Due to unemployment in the area. The phone number of the Local 669 unemployment service is 800-638-0997.

JJW:ab

cc: Applicant – certified

APPENDIX J

FORM LETTER CREATED IN APRIL 1987 FROM JOHN J. WALSH, DIRECTOR OF APPRENTICESHIP, LOCAL 669, TO DEAR APPRENTICE APPLICANT WITH APPRENTICE SCHOLARSHIP LOAN AGREEMENT AND APPRENTICE PROMISSORY DEMAND (NOTE) FOR SCHOLARSHIP LOAN AGREEMENT

Local 669 Joint Apprenticeship and Training Committee
7676 NEW HAMPSHIRE AVENUE • LANGLEY PARK, MARYLAND 20783 • SUITE 200
Telephone: 301-431-3500 Toll Free: 800-638-0592
[LOGO]
JOHN J. WALSH
Director

Re: Local 669 JATC
Scholarship Loan Agreement

Dear Apprentice Applicant:

The Local 669 Joint Apprenticeship & Training Committee requires as a condition of entering the Apprenticeship Program that the applicant sign a Loan Agreement and a Promissory Note covering the cost of training. As the Contract indicates the note can be paid off by working for 10 years after attaining Journeyman status for employers making payments to the Local 669 Educational Fund or to a similar Joint Apprenticeship & Training Fund. However, a person who enters employment in any facet of the piping industry of an employer performing work covered by the Constitution of the United Association who does not contribute to a Jointly Administered Educational Fund will be required to reimburse the Local 669 Educational Fund for the training received.

Action will not be taken to seek reimbursement from an individual who leaves the trade but does not utilize the knowledge gained in the trade in earning his/her livelihood.

All applicants are to complete the documents for the entire period of apprenticeship. If you receive 6 months or more credit for prior trade or related experience, the Committee will, when granting that credit, sent to you for completion and return to the Joint Apprenticeship & Training Committee Office a revised Contract and Note indicating a schedule based on a proportionately lower cost for training.

Directions:

Contract

Introductory Paragraph – Type or print the date and your name.

Section 9 – Type or print your name and address.

Section 10 – Type or print the date and *sign your name.*

Promissory Note

Introductory Paragraph – Type or print your name and the date.

Second Page – Type or print your name, address and the date. *Sign your name.*

The completed Contract and Promissory Note has to be submitted to the joint Apprenticeship & Training Committee with the other required paperwork by your sponsoring contractor if and when the contractor submits your application to the JATC for your entry into the Apprenticeship Program.

When you are accepted into the Apprenticeship Program, the Director of Apprenticeship shall sign the Contract as the agent of the Committee and copies of the documents will be forwarded to you for your records.

Very Truly yours,

/s/ John J. Walsh
John J. Walsh
Director

P.S. If you have any questions
contact me at the above
Toll Free number.

enclosure
4/87

APPRENTICE SCHOLARSHIP LOAN AGREEMENT NATIONAL AUTOMATIC SPRINKLER - LOCAL 669, UA EDUCATION FUND

This Agreement is entered into ________, 19___ between the Local 669 Joint Apprenticeship and Training Committee (hereinafter referred to as "Committee") and ___ (hereafter referred to as the "Apprentice").

The Committee and the Apprentice understand and agree that the National Automatic Sprinkler - Local 669, UA Education Fund will expend significant sums of money to train the Apprentice in the specialized skills necessary for employment in the Sprinkler Industry and that this training is a direct benefit to the Apprentice which will enable the Apprentice to earn significant compensation in the Sprinkler Industry.

The Apprentice further understands and agrees that the training will be provided to him by the Committee and will be financed by a Scholarship Loan from the assets of the National Automatic Sprinkler – Local 669, UA Education Fund as authorized by the Trustees of the Fund.

The Apprentice further understands and agrees to assume certain obligations arising as a result of the training provided by the Committee, including the obligation to repay the total Scholarship Loan made to the Apprentice for all years of training.

NOW, THEREFORE, the Committee and Apprentice agreed, for the good and valuable consideration set forth in this Agreement, to the following:

1. The Committee will grant a Scholarship Loan to the Apprentice in the amount set forth in Paragraph 2 which covers the cost of the Apprentice's entire training. The Apprentice's training consists of five (5) years of accredited trade experience and satisfactory completion of the Related Training Program consisting of a minimum of 210 lessons and 19 courses. The requirements of the Training Program are set forth in detail in the "Apprenticeship Standards Between Road Sprinkler Fitters Local Union No. 669 of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada and the National Fire Sprinkler Association, Inc."

2. Amount of Scholarship Loan. The Committee and the Apprentice hereby agree that the cost of training includes books; manuals; necessary equipment; instructors' salaries, instructor training, and expenses (where applicable); tutors; course work through the Pennsylvania State University; and the Apprentice Training Program Administration. The amount of the Scholarship Loan shall be the cost of the above items for the Apprentice's entire period of training which shall be at least $6000.00. The Apprentice agrees to execute a promissory note for this amount.

The Committee and the Apprentice hereby agree that the cost of the training shall be calculated by the Committee based upon actual training costs for prior years and a reasonable allowance for inflation. In the event the Apprentice's actual training costs exceed the amount of the original Scholarship Loan by 5% or more, the Apprentice agrees to execute an additional promissory note, if requested by the Committee, for the difference between the original promissory note and the actual cost of training. In the event the Apprentice's actual cost of training is smaller than the original Scholarship Loan by 5% or more, the Apprentice agrees to execute a substitute a [sic] Promissory Note for the lesser amount. In the event the Apprentice fails to execute a substitute Promissory Note upon the request of the Committee, the original Promissory Note shall apply and may be enforced.

3. The Apprentice agrees to repay the Scholarship Loan in full (including amounts in excess of the amount of the original promissory note). The Scholarship Loan may be repaid by the Apprentice either in cash according to the schedule in Exhibit 1, attached, or by in-kind

credits according to the same schedule under the terms set forth in Paragraph 4 below. The Repayment Period starts the first day of the first calendar month after the Apprentice has withdrawn from or completed the Training Program.

4. Repayment by In-Kind Credits: An Apprentice, who works, after completion of or withdrawal from the Training Program, pursuant to a collective bargaining agreement for an Employer making payments to the Fund or a like Joint Apprenticeship Fund or Training Fund, will receive a credit for each calendar year of such employment in accordance with the Repayment Schedule set out in Exhibit 1 and in the Promissory Note attached hereto as Exhibit 2 and any subsequent Promissory Note signed by the Apprentice. The amount due the Committee for the Scholarship Loan will be reduced in accordance with the Repayment Schedule. In the event such employment is not available to the Apprentice for any year of the Repayment Period, the Apprentice may ask the Committee for a grace period during which no repayment is due, as long as the Apprentice does no work in violation of Paragraphs 5 and 6 of this Agreement.

5. Warranty of the Apprentice: The Apprentice agrees and warrants as a condition of receiving the Scholarship Loan that upon completion of the Training Period, or upon the Apprentices Withdrawal from training or upon cancellation of the Agreement, the Apprentice will neither seek nor accept employment from an Employer engaged in nor become Employer engaged in, any general, mechanical, plumbing or pipefitting work or any other work covered by the Constitution of the United Association of Journeymen and Apprentices of the

Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO, unless such employment is performed under their terms of a collective bargaining agreement that provides for the payment of contributions by such Employer to the Fund or a like Joint Apprenticeship or Training Fund.

As used herein the term "Plumbing and Pipefitting Industry" means any and all types of work covered by collective bargaining agreements to which the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO (hereinafter "United Association") and/or any affiliated Local Union are a party or under the trade jurisdiction of the United Association's Constitution; or in a related building trade.

6. Breach of this Agreement: It will constitute an immediate breach of this Agreement if the Apprentice accepts employment in the Plumbing and Pipefitting Industry from an Employer who does not have a collective bargaining agreement which provides for the payment of contributions to the Fund or a like Joint Apprenticeship or Training Fund.

7. All Amounts Due and Payable if Breach Occurs: If the Apprentice breaches this Agreement, all amounts due and owing on the Scholarship Loan, reduced by any credit received by the Apprentice pursuant to Paragraph 4 hereof, or by any cash payments made, will become immediately due and payable, together with interest at the interest rate from the date of this Agreement pursuant to §6621 of the Internal Revenue Code of 1954, and all costs of collection hereof, including

reasonable attorney's fees and all court costs. The Apprentice hereby agrees and covenants to accept all service and jurisdiction of any competent court determined by the Committee by the mailing of a copy of the Complaint brought pursuant to this Agreement to the current address provided in Paragraph 9 hereof.

8. Waiver of Unintentional Breach: An unintentional breach of this Agreement may be waived in writing by the Committee in its sole discretion, and a waiver of such unintentional breach of this Agreement will not be unreasonably withheld by the Committee.

9. Notice: All notices under this Agreement, including service of a Complaint on the Apprentice in the event of a Breach will be sent to the Committee and Apprentice as follows:

Apprentice: Name ___________
Address _________
City _____________
State _____________
Zip _____________

The Apprentice hereby agrees to notify promptly the Committee of any change in the Apprentice's address.

10. The Apprentice, by signing this Scholarship Loan Agreement and Promissory Note, acknowledges that he or she has received a completed copy of this Agreement and Promissory Note.

Singed and Agreed to this ___ day of ________, 19___.

By ___________

Signature and Title
Joint Apprenticeship Committee

By ___________

Apprentice

EXHIBIT 1

REPAYMENT SCHEDULE FOR SCHOLARSHIP LOAN
Amount of Loan $6000.00

Years worked after Completion or Withdrawal from Program	Percent of Total Reduced	Annual Amount Reduced	Cumulative Amount Reduced	Net Amount Due
1	5%	$300.00	$ 300.00	$5700.00
2	6%	360.00	660.00	5340.00
3	7%	420.00	1080.00	4920.00
4	8%	480.00	1560.00	4440.00
5	9%	540.00	2100.00	3900.00
6	11%	660.00	2760.00	3240.00
7	12%	720.00	3480.00	2520.00
8	13%	780.00	4260.00	1740.00
9	14%	840.00	5100.00	900.00
10	15%	900.00	6000.00	–0–
	100%			

EXHIBIT 2

APPRENTICE PROMISSORY DEMAND FOR SCHOLARSHIP LOAN AGREEMENT

$6000.00

I, ____________, hereinafter known as Apprentice, hereby promise to pay to National Automatic Sprinkler Local 669, UA Education Fund (the "Fund") on demand a Scholarship Loan of $7200.00 (the "Loan Amount") in accordance with the terms and provisions of the Scholarship Loan Agreement between the undersigned and the Committee, dated _________, 19___ (the "Agreement"). That Loan Amount represents direct and indirect training costs provided by the Committee from the assets of the Fund.

I also understand that the Loan Amount will be reduced in accordance with Paragraph 4 of the Agreement for every year I work for an Employer within the Plumbing and Pipefitting Industry who makes contributions, pursuant to a collective bargaining agreement, to the Fund or a like Joint Apprenticeship or Training Fund, as follows:

J-11

REPAYMENT SCHEDULE FOR SCHOLARSHIP LOAN

Years worked after Completion or Withdrawal from Program	Percent of Total Reduced	Annual Amount Reduced	Cumulative Amount Reduced	Net Amount Due
1	5%	$300.00	$ 300.00	$5700.00
2	6%	360.00	660.00	5340.00
3	7%	420.00	1080.00	4920.00
4	8%	480.00	1560.00	4440.00
5	9%	540.00	2100.00	3900.00
6	11%	660.00	2760.00	3240.00
7	12%	720.00	3480.00	2520.00
8	13%	780.00	4260.00	1740.00
9	14%	840.00	5100.00	900.00
10	15%	900.00	6000.00	–0–
	100%			

I agree that if legal action is required to collect this Demand Note that I will pay interest at the interest rate pursuant to §6621 of the Internal Revenue Code of from the date of this Note and Agreement, plus reasonable attorneys' fees and all court costs.

Name: ____________________ ____________________________

(print) (signature)

Address: __________________ ____________________________

(date)

____

City State Zip

____

APPENDIX K

LETTER DATED OCTOBER 10, 1991 TO TRIPLE A FIRE PROTECTION, INC. FROM JOHN J. WALSH, DIRECTOR OF APPRENTICESHIP OF LOCAL 669 WITH CERTIFIED COPY TO FOUR APPLICANTS

RESPONDENTS EXHIBIT 12 – REJECTED

Local 669 Joint Apprenticeship and
Training Committee
7676 NEW HAMPSHIRE AVENUE
• LANGLEY PARK MARYLAND 20783 •
SUITE 416
Telephone: 301-431-3500 Toll Free: 800-638-0592

October 10, 1991 JOHN J. WALSH
CERTIFIED Director

Triple "A" Fire Protection
8000 Wards Lane – P. O. Box 1037
Semmes, AL 36575

RE: Anthony McIlwain SS# 424 04 ___
Teddy McIlwain SS# 418 08 63 ___
Markal Fowler SS# 587 94 9221
Michael Ellis SS# 256 70 1497

Gentlemen:

This is to acknowledge receipt of your request to sponsor the above-named applicant for entry into the Apprenticeship Program. Action on this request is being delayed pending . . . [r]eceipt of applicant's signed Scholarship Loan Agreement.

Very truly yours,

/s/ John J. Walsh
John J. Walsh
Director of Apprenticeship
of Local 669

cc: Applicant – certified
R. Phillips

APPENDIX L
EXCERPTS FROM CONSTITUTION OF UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA

RESPONDENTS EXHIBIT 16

Helpers and/or Apprentices

SEC. 154. (a) No journeyman member will be permitted to work with an apprentice or helper who is not a member except apprentices who have made an application for membership in the Local Union and the United Association, and who are covered by a written apprenticeship agreement and are serving a probationary period (not to exceed six months) in a training program under the administration of an apprenticeship committee or as provided by the 30 day period under a union security clause.

* * *

SEC. 155. (a) Cancellation of an apprentice's agreement, for a just cause, after notice and hearing by the apprenticeship committee, shall automatically cancel his membership in the United Association and the Local Union. The committee shall notify the Financial Secretary of the Local Union of all such cancellations and the Financial Secretary shall notify the General Secretary-Treasurer of the United Association.

APPENDIX M

EXCERPTS FROM ROAD SPRINKLER FITTERS LOCAL UNION NO. 669 CONSTITUTION AND BY-LAWS

RESPONDENTS EXHIBIT 26

ARTICLE 21

Section 5. . . . No member of Local 669 shall work with sprinkler fitters who are not members of a United Association Local, except as may otherwise be provided in a United Association collective bargaining agreement.

* * *

Section 8. All members of Local 669, after notifying the Employment Service they are out of work, shall notify the Employment Service within twenty-four (24) hours after they have returned to work. Any member found in violation of this Section may be fined Ten Dollars ($10.00).

* * *

Section 20. No member of Local 669 shall be allowed to resign from the Union subsequent to the determination to strike an employer or during a strike and any member crossing picket lines established by Local 669 shall be subject to trial and fine for violation of this Section.

* * *

ARTICLE 23

Section 1. The Financial Secretary-Treasurer shall cause to be issued from the Local's office a monthly newsletter. Said newsletter shall be edited and managed by him under direction of the Business Manager and the Executive Board.

APPENDIX N

LOCAL 669 "NewsLetter," MARCH 1991 EXCERPTS

RESPONDENT'S EXHIBIT 88

Message of the Executive Board

The Executive Board met on February 14-15, 1991 in the National Office and all members were present.

The Executive Board is asking the membership to support our Negotiating Committee and Local Union during the current negotiations. We need to show that we have total solidarity.

The Board would like to thank those who took the time to vote for the purchase of an office facility for the National Office.

The following action was taken on Hearing Officer Reports at a previous meeting:

Burch, Burleigh C., Card No. 97707, Oxnard, California – his member of Local 669 was found guilty of violating the U.A. Constitution, Section 200(c), expelled and assessed a $5,000.00 raised reinitiation fee.

Mathews, Rodney R., Card No. 529-86-7984, Riverton, Utah – This member of Local 669 was found guilty of violating the U.A. Constitution, Section 200(a) and the Local 669 Constitution and By-Laws, Article 21, Section 2, expelled and assessed a $5,000.00 raised reinitiation fee.

Paul, Edward F., Case No. 970568, Ojai, California – This member was found guilty of violating the U.A. Constitution, Section 200(a), expelled and assessed a $5,000.00 raised reintiation fee.

Vasquez, Jose, Case No. 346-34-8920, Fresno, California – This member of Local 483 was found guilty of violating the U.A. Constitution, Section 225(n) and assessed a $500.00 fine.

Respectfully submitted,

Ronald I. Turner, Recording Secretary
John D. Bodine, Vice President
Frank B. Cranmer
William J. Viersen
Daniel Walsh